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MANUAL

OF

New York Laws Relating to Elections

BY

JOHN GODFREY SAXE, M.A., LL.B.

STATE SENATOR, 1911, 1912

COUNSEL TO THE GOVERNOR, 1914

DELEGATE TO THE CONSTITUTIONAL CONVENTION, 1915

"The right of suffrage is one of the most valuable and sacred rights which the constitution has conferred upon the citizen of the state."

People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175, 178

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1915

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Part First

THE CONSTITUTION

ARTICLE I

THE CONSTITUTION AND ITS INTERPRETATION

Tripartite System: The constitution of the State of New York, adopted in 1894, recognizes the tripartite system of government which is the foundation of American liberty. (Kilbourn *v.* Thompson, 103 U. S. 168.) The legislative department makes the laws, while the executive executes and the judiciary construes and applies them. (Matter of Davies, 168 N. Y. 89; Matter of Guden, 171 N. Y. 529.) The constitution vests the legislative power in the senate and assembly (Constitution, Article 3, Sec. 1), the executive power in the governor (Article 4, Sec. 1), while the courts are vested with jurisdiction in law and equity. (Article 6.) Each, within its sphere, is intended to be independent of the others. (Matter of Reynolds, 144 App. Div. 458.)

Legislative Power: In view of the fact that the constitution confers the legislative power upon the senate and assembly, any and all legislation is a valid exercise of legislative power unless it violates some provision of the constitution. The general legislative power is absolute and unlimited, except as restrained by the constitution. (People *v.* West, 106 N. Y. 293; Sherrill *v.* O'Brien, 188 N. Y. 185, 199.) The legislative power has no other limitation. The theory that laws may be declared void when deemed opposed to natural justice and equity, although they do not vio-

late any constitutional provision, has been repudiated by numerous authorities. (Bertholf *v.* O'Reilly, 74 N. Y. 509, 514–515.) Courts do not sit in review of the discretion of the legislature or determine upon the expediency or wisdom or propriety of legislative action. (People *ex rel.* Sturgis *v.* Fallon, 152 N. Y. 1, 11.) They have repeatedly declared that there is room for much bad legislation and misgovernment within the pale of the constitution, but, whenever this happens, the remedy which the constitution provides, by opportunity for frequent renewals of legislative bodies, is far more efficacious than any which can be afforded by the judiciary. (People *v.* Draper, 15 N. Y. 532, 545; Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 388–389.)

Election Laws: There is nothing peculiar about election laws in any of these respects. Subject to the restrictions and limitations of the constitution, the power of the legislature to enact election laws is absolute and uncontrollable (Ahern *v.* Elder, 195 N. Y. 493); and before a court declares a statute invalid which makes any enactment in relation to elections, it should clearly appear that the statute is irreconcilable with the constitution. (Hopper *v.* Britt, 203 N. Y. 144.)

Implied Unconstitutionality: In determining the constitutionality of a statute, regard must be had, not merely to the constitution itself, but to the decisions of the court interpreting the constitution, for, under the constitution, it is the courts which must determine, in the last analysis, whether or not the legislature, in a given case, has violated the provisions of the constitution. A statute which violates the express terms of the constitution is obviously unconstitutional, and the determination of that fact involves no difficulty;

but, since no constitution was ever drawn so as to be an effective foundation for the government of a state, without applying thereto the doctrine of implication, the courts have also held that whatever is necessary to render effective any provision of a constitution must be deemed implied and intended in the provision itself. (Fraser *v.* Brown, 203 N. Y. 136.) In other words, constitutions, like other instruments, necessarily contain certain propositions which the instruments import, as well as those they expressly and in terms assert. Therefore, legislation contravening what a constitution necessarily imports is void equally with the legislation contravening its express commands. (Hopper *v.* Britt, 203 N. Y. 144.)

Principles of Construction: There are many settled principles which may be invoked in the interpretation of constitutional provisions. A cardinal rule in dealing with constitutions is that they should receive a consistent and uniform interpretation. (6 Ruling Case Law, Sec. 39.) Among the other familiar rules of construction, particularly those that may be invoked in determining the constitutionality of election laws are the following. Every act of the legislature must be presumed to be in harmony with the fundamental law unless the contrary is clearly made to appear. (People *ex rel.* Kemmler *v.* Durston, 119 N. Y. 569, 577.) A constitution is to be construed as prepared and adopted in reference to existing statutory laws upon the subject. (People *ex rel.* Jackson *v.* Potter, 47 N. Y. 375, 380.) The practical construction of a provision by the legislature is entitled to the "greatest weight." (People *ex rel.* Williams *v.* Dayton, 55 N. Y. 367, 378; New York *v.* City Railroad, 193 N. Y. 543, 549.) An arrangement made by law for enabling the citizens to vote should not be invalidated by the

court, unless the arguments against it are "so clear and conclusive as to be unanswerable." (People *ex rel.* Lardner *v.* Carson, 155 N. Y. 491, 501.)

ARTICLE II

FRANCHISE, RIGHTS AND PRIVILEGES OF MEMBERS OF THE STATE

Franchise of Voters: The constitution provides that "no member of this state shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." (Article 1, Sec. 1.) It also defines the qualifications and disqualifications of voters (Article 2, Sec. 1), and expressly authorizes the legislature to make laws "for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage and for the registration of voters." (Article 2, Sec. 4.)

Voting: The constitution thus guarantees freedom in voting (Hopper *v.* Britt, 204 N. Y. 524) and the power of the legislature to regulate elections must be so exercised as not to deny or impair the franchise, rights and privileges of members of the state. (Matter of Callahan, 200 N. Y. 59.) Any method of holding an election which would deprive voters free from fault or personal misfortune of the right of casting their ballots and having effect given to the votes so cast is unconstitutional. (People *ex rel.* Deister *v.* Wintermute, 194 N. Y. 99, 108.)

Nominating: The voter's franchise is not only the right to vote for public officers at general and special elections, but it also includes the right to participate in the general methods established by law for the

selection of candidates to be voted for. (Burke *v.* Terry, 203 N. Y. 293; People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231.)

Equality of Opportunity: The constitution requires equality of opportunity. The official ballot would be unconstitutional if it did not afford the illiterate voter an opportunity to vote by securing assistance, and to every voter the right to vote for whom he chooses, by writing a candidate's name in one of the blank spaces. (People *ex rel.* Bradley *v.* Shaw, 133 N. Y. 493; Hopper *v.* Britt, 203 N. Y. 144.) It would be unconstitutional if it allowed only the names of party candidates to be printed on the official ballot to the exclusion of candidates named by considerable bodies of citizens acting independently of party (Burke *v.* Terry, 203 N. Y. 293); and provisions requiring a prohibitory number of signatures to independent nominating certificates are obviously unconstitutional. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231; People *ex rel.* Woodruff *v.* Britt, 206 N. Y. 246; Matter of O'Brien, 206 N. Y. 694.) Legislation must not discriminate in favor of one set of candidates against another set of candidates, and a provision which prohibits a committee of a party from nominating a candidate already nominated by another party or independent body is unconstitutional. (Matter of Callahan, 200 N. Y. 59.)

Name on Ballot Only Once: Prior to the substitution of the Massachusetts form of ballot for the party column ballot, which was in use for many years prior to December, 1913, it was held that the principle that equality of opportunity must be afforded to all voters rendered invalid a provision that the name of a candidate should be printed but once upon the party column ballot. The effect of the provision, as applied

by the legislature to the party column ballot, was to permit the voters of one party to vote for all the candidates of that party by making a single cross-mark, while it required the voters of the other party to make *two* cross-marks in order to vote such a "*straight*" ticket; and the precise decision of the court was that the constitution guarantees to the voter the right to express his will by a single mark if others are given the right to express their will by a single mark. (Hopper *v.* Britt, 203 N. Y. 144; Hopper *v.* Britt, 204 N. Y. 524.) These decisions related solely to a particular provision as applied to the old party column ballot and the courts declined to follow the decision of the courts of several states upholding election laws with similar provisions (Todd *v.* Election Commissioners, 104 Mich. 474.) They have no bearing on the question of the constitutionality of the Massachusetts form of ballot because the Massachusetts ballot law requires every voter alike to make a separate cross for each and every candidate for whom he wishes to vote and thus affords precise equality to all.

Emblems: There are dicta to the effect that emblems are "necessary." (Hopper *v.* Britt, 204 N. Y. 524.) It would seem, however, that, so long as the ignorant voter has some method by which to be informed as to the candidates for election, an emblem is not indispensable. It would, however, be unfair discrimination to permit one set of candidates to have an emblem and to prohibit another set of candidates from having an emblem; although, before emblems at primaries were abolished, it was held that a provision conferring on the party machine the right to use a party emblem at primaries as against other party members was constitutional. (Hopper *v.* Britt, 204 N. Y. 524.)

Proper Safeguards for Independent Nominations: Where nominators, in filing an independent nominating certificate, choose to file several separate sheets of signatures, the legislature may lawfully provide that no such separate sheet shall be received, if five per cent of the names thereon are fraudulent or forged. Such a provision, while it may tend to throw out valid signatures because of invalid ones on the same sheet, is nevertheless constitutional; for it does not necessarily throw out valid signatures, since the effect of the provision may be obviated either by using a single sheet or by filing a separate sheet for each signature. (Burke *v.* Terry, 203 N. Y. 293.) A provision that the name of no person signing an independent certificate of nomination shall be counted unless the signer is or becomes registered has been sustained as tending to prevent fraud and to make more certain the good faith of the signers; and a provision prohibiting an enrolled member of a party from signing an independent certificate of nomination for a candidate of his own party for the same office, has also been sustained as tending "to prevent a wrongful use of independent nominations." (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231; *post*, p. 86.)

ARTICLE III

QUALIFICATIONS AND DISQUALIFICATIONS

Qualifications: The constitution prescribes the qualifications and disqualifications of voters. The qualifications are as follows: Male sex. Twenty-one years of age. A citizen for ninety days. An inhabitant of the state for one year. A resident of the county for four months. A resident of the election

district for thirty days. These qualifications entitle the voter to vote at the election in the election district of which he, at the time, shall be a resident (and not elsewhere) for all offices that are made elective by the constitution and upon all questions submitted. (Article 2, Sec. 1.)

Male Suffrage: Constitutional officers can only be voted for by males. (Matter of Gage, 141 N. Y. 112.)

Woman's Suffrage: The legislatures of 1913 and 1915 agreed to a constitutional amendment authorizing woman's suffrage, by striking from the constitution the word "male" and making it clear that a voter, otherwise qualified, may vote regardless of the sex to which he "or she" belongs, but containing a limitation that "a citizen by marriage shall have been an inhabitant of the United States for five years." Unless the constitutional convention of 1915 otherwise directs, this amendment must be submitted to the people for approval at the general election in 1915. If so approved by the people, it will become a part of the constitution from and after January 1, 1916. (Article 14, Sec. 1.)

Majority: A man becomes of age the day before his twenty-first birthday. (Hancock, A.-G., A.-G. Rep. of 1897, p. 301; A.-G. Rep. of 1898, p. 283.)

Thirty Days: The thirty days' residence required must be complete on the day of election and, in computing the time, the first and the last days cannot both be counted. (People *v.* Brennan, Bischoff, J., Law Journal, October 25, 1901.)

Disqualifications: The disqualifications consist in the improper use or receipt of money in connection with elections and wagering on the result of elections. Upon challenge for such cause, the person so challenged, before the officers shall receive his vote, shall

swear or affirm that he has not done any of the acts prohibited. The legislature is directed to enact laws excluding from the right of suffrage all persons convicted of bribery or any infamous crime. (Article 2, Sec. 2.)

Legislative Powers: The constitution thus prescribing the qualifications and disqualifications of voters, the legislature is without power to prescribe additional qualifications or disqualifications. It may enact laws excluding persons convicted of bribery or any infamous crime. It may make laws for ascertaining, by proper proofs, who are entitled to the right of suffrage and for the registration of voters (Article 2, Sec. 4), but, at that point, its powers end; and the courts, from time to time, have been called upon to determine whether some requirement of the election law amounts to an additional qualification, or whether it is a proper law for ascertaining, by proper proofs, who is entitled to the right of suffrage. So long as laws do not add to the qualifications required of electors by the constitution, the legislative will is supreme. (Ahern *v.* Elder, 195 N. Y. 493.)

Additional Oath: At or about the close of the Civil War, the legislature passed a law requiring voters to take oath that they had never voluntarily borne arms against the United States, and it was held that this amounted to the creation of a disability and a restriction of the right of suffrage and was unconstitutional. The provision was also held to be unconstitutional in that it deprived the voter of his rights without regard to the law of the land. (Green *v.* Shumway, 39 N. Y. 418.)

Signing Register: In a more recent case, the courts considered a provision of the election law relating exclusively to cities of a million or more inhabitants,

requiring the elector, at the time of registration, to sign his name in the registry book, and, in a case where he could not write, to undergo additional cross-examination, and held that this provision did not prescribe an additional qualification, but, on the contrary, its general scope was such as to bring it within the express command of the constitution, and that it was a reasonable regulation designed to secure accurate information concerning the qualifications of voters, including a proper method of identification. (Ahern *v.* Elder, 195 N. Y. 493.)

Absolute Right to Vote; Election Officers: The courts have repeatedly held that, under the system of elections in New York, inspectors of election act only ministerially, and when a person legally qualified offers to vote and is willing to take the general oath prescribed by statute and takes it, his vote *must be received* (People *ex rel.* Sherwood *v.* Board, 129 N. Y. 360), even though he refuses to answer some question other than the statutory questions (Goetcheus *v.* Matthewson, 61 N. Y. 420), or his answers are unsatisfactory (People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175), or some one else has previously voted on his name. (People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670.) An attempt to arrest a voter when he demands to be allowed to vote is itself a violation of the constitution. (People *v.* Hochstim, 76 App. Div. 25.) It, therefore, would seem that a statute which attempts to confer judicial power upon inspectors and authorizes them to determine summarily the right of the voter to vote would violate a voter's constitutional rights, and the courts have so held. Thus, in a case where certain inspectors claimed the right to act on independent knowledge and to refuse to allow certain persons to vote, although the latter had satisfied the statu-

tory test, Gray, J., speaking for an unanimous court of appeals, said: "I must say, that, to my mind, this claim is as unreasonable, as it is absolutely lacking in support in the fundamental, or in statutory law. It is repugnant to fundamental principles and to authority. I may fairly premise what brief discussion I may feel bound to enter upon, in connection with the law regulating elections in this state, with the remark, that if these appellants are right in their contention, then a way is made possible to perpetrate a great outrage upon the rights of electors. Under the present scheme of nonpartisan boards of election inspectors, wherein the principal political parties in the state are intended to have equal representation, by a contumacious refusal of party adherents to sign an election return, based on the pretense that they were not satisfied in their minds that all of the ballots taken were cast by qualified and registered electors, the disfranchisement of all the electors in the election district could be effected. They could prevent the reception of a ballot from a proposed elector, on their theory that a ballot is not finally received until by action of the majority of the board; for they would only have to oppose to the proofs required by the election law and made by the person, their mental convictions that, notwithstanding them, he was not the elector he swore he was. I do not, and cannot think such a result was ever intended, or can be fairly reached upon a consideration of the law. It is inconceivable that any such power should be lodged in election inspectors; or that they should be clothed with a discretion to reject a ballot offered by a proposed elector, whose qualifications, in case of challenge, are proved by the statutory methods. . . . To say that the right of the elector to cast ballot is subject to board action is

equivalent to saying that they have power to decide upon the evidence as to the unlawfulness of the vote. That cannot be so. That would permit of an elector's rights being adjudged away and himself disfranchised, and on only such evidence as the statute prescribes. The lawfulness of a vote cannot be determined until it has been received, and an elector's rights cannot be annulled without a trial, where he may have an opportunity of bringing forward his proofs and having them passed upon in a proper way and by a proper tribunal. To hold any other doctrine we would have to disregard the spirit of our laws and the fundamental idea of an electoral franchise." (People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175.)

Extent of Right: So long as an election is not a mere matter of stratagem and artifice (People *ex rel.* Woods *v.* Crissey, 91 N. Y. 616, 634–635; People *ex rel.* Deitz *v.* Hogan, 214 N. Y. 216), where the constitution or a statute requires a special election on the day of a general election and the name of the office does not appear on the ballot, the voter has a "constitutional right" to write in both the name of the office and of his candidate therefor. (People *ex rel.* Davies *v.* Cowles, 13 N. Y. 350; People *ex rel.* Goring *v.* Wappingers Falls, 144 N. Y. 616; see *post*, p 66.)

ARTICLE IV

RESIDENCE

The Constitution: The constitution provides that every male citizen of a specified age, citizenship and inhabitancy, who shall have been for the last four months a "resident" of the county and for the last thirty days a "resident" of the election district in

which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a "resident." (Article 2, Sec. 1.) The constitution does not attempt to define or limit the term "resident" and the necessary effect of its language is to confer upon any voter, *if he is a "resident," as a matter of fact*, the franchise, rights and privileges of members of the state. (Article 1, Sec. 1.) In other words, the legislature has not power to abrogate the franchise of a "resident," in the broadest sense of the word, nor has it power to confer the right to vote on an individual who is not such a "resident."

Judicial Definition: The courts have recognized and applied "the admitted truth, acted upon at every election, that the voting residence may be in one place and the actual abode in another." (Matter of Goodman, 146 N. Y. 284, 288.) If a voter has only one residence, that is obviously the only place from which he may register and vote, but proof of one residence does not disprove another residence. Many voters have more than one residence, their old home and a new place of sojourn, a town and a country home, or two places of abode in the same locality; and the courts recognize that a voter who has two residences may elect to make a domicile or voting residence of either. (Matter of Newcomb, 192 N. Y. 238, 252.) In such cases the voter's residence for the purpose of voting depends on a union of residence and intention (Matter of Newcomb, *supra*, at p. 250), and thus becomes a question of the voter's intent, which can be known with certainty only to himself, without likelihood of contradiction. Thomas C. Platt for many years voted at Owego and lived with his family in New York City, and the court of appeals recog-

nized that he had these two residences, and even held that his domicile was his voting residence at Owego. (People *v.* Platt, 117 N. Y. 159.) Similarly, it has been repeatedly held that absence, however long, so that it is not in abandonment of home, will not deprive a voter of his residence, though his absence extends through a series of years. (People *v.* Platt, *supra;* Hart *v.* Kip, 148 N. Y. 306, 309.) In 1906, Attorney-General Julius M. Mayer ruled that many citizens physically live in one place most of the time, yet take, and have the right to take, another place which they make their legal residence for voting purposes (Opinion of Mayer, A.-G., May 22, 1906); and in 1911, Attorney-General Thomas Carmody rendered an opinion to Hon. Samuel J. Tilden, of New Lebanon, covering four different classes of cases, in each of which the voter had one residence at Pittsfield, Massachusetts, where he lived and worked, and yet sought to vote at New Lebanon, New York, which he declared to be his voting residence, and the attorney-general, after pointing out that a voting residence "is very largely a matter of intention and so each case depends on its own peculiar facts," held that "I am of the opinion that upon the facts stated, they are entitled to vote at the election in your town." (Opinion of Carmody, A.-G., March 8, 1911.)

The so-called "Gavegan decision" (People *ex rel.* Driscoll *v.* Bender, 82 Misc. 671) had considerable public notice and deserves comment. It was rendered on the eve of the November, 1913, election and was a magistrate's decision, rendered by a justice of the supreme court, who left the bench temporarily to sit as a magistrate. The precise decision was that a warrant of arrest should be issued, and the opinion was written upon a preliminary motion to dis-

miss the proceeding. What the magistrate held was that the evidence before him showed "beyond question" that, at the time the defendant registered from Cherry street, he actually resided on Morningside East, and that the latter address was "his permanent fixed place of abode or home." Assuming that the evidence justified this finding, the decision can be sustained, but, if the language of the opinion be taken to mean that a voter who has several residences cannot legally elect any one of such residences as his voting residence, it is in conflict with the constitution and the law. In other words, the constitution confers a franchise upon a "resident" and if a voter is, *as a matter of fact,* a "resident" of two different places, neither the legislature nor the judiciary can limit the right of that resident to vote from any one of the two residences which he, in due time, selects as his voting residence. The opinion states that "a voting residence as distinguished from the place where one actually and habitually dwells is not recognized by law." This is true with two modifications—first, that a voter, as in the case of Thomas C. Platt, having acquired a residence may return each year to that place to vote, although he "actually and habitually" dwells somewhere else, and second, that a voter who "actually" (not habitually) dwells in more than one place may select his voting residence either from the one or from the other.

As above stated, this opinion was written when the warrant for Bender's arrest was issued. The indictment against him was subsequently dismissed.

Mills Hotels and Other Irregular Homes: A voter may legally register from a lighter occasionally attached to a pier. (Matter of Collins, 64 How. Prac.

63, Freedman, J.) Demolition of the voter's residence after registering does not affect his right to vote therefrom. (Cunneen, A.-G., A.-G. Rep. 1903.) Where a voter has kept his voting residence at his former home, his son, on becoming of age, may vote from there also. (Ainsworth, A.-G., A.-G. Rep. of 1906, p. 278.) In New York City the case frequently arises of a voter who is too poor to have a sleeping place every night, and the proofs show that he signed a book in a sleeping hotel, such as one of the Mills Hotels, more than thirty days prior to election and also signed the book on several occasions during the thirty-day period, although on other nights he probably slept on a bench in a park or possibly even at another hotel of like character outside the election district. The New York constitution makes no distinction based upon affluence or poverty nor upon learning or ignorance. A citizen and an inhabitant of the state, therefore, who becomes a resident of one of these sleeping hotels in the manner indicated may legally register and vote therefrom. (Jackson, A.-G., A.-G. Rep. of 1908, 412.) In other words, he is a resident of a hotel. As a matter of fact, it is the only fixed residence he has, and such being his "residence" the only manner in which he can be deprived of his right to register his vote is by an amendment to the constitution. This is the position which has generally been taken on election day when commitments have been asked for against this class of voters, although occasionally some justice of general sessions or some magistrate has declined to find that, as a matter of fact, a voter has established any residence by sleeping a few nights at one of this class of hotels.

Losing or Gaining a Residence: The constitution also contains a provision that, for the purpose of vot-

ing, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or engaged in the navigation of the waters of this state, the United States or the high seas, or a student of any seminary of learning, or kept at any almshouse or other asylum or institution wholly or partly supported at public expense or by charity, or confined in any public prison. (Article 2, Sec. 3.) The plain reading of this provision is that the sojourn indicated has no effect whatever, one way or another, on the question of legal residence for the purpose of voting. (Matter of Barry, 164 N. Y. 18.) It does not mean that the voter cannot secure a new residence in his new place of sojourn, but it means that, in determining whether he has secured such a new residence, the fact of his presence or absence is without any significance whatever. It settles a disputed question as to the effect of such presence, and declares that it does not constitute a test of a right to vote and is not to be so regarded. (Silvey *v.* Lindsay, 107 N. Y. 55.) It is only in quite exceptional cases that the voter can secure a new residence under the circumstances specified (Matter of Goodman, 146 N. Y. 284) and most of the efforts to escape from the constitutional inhibition have failed. (People *v.* Cady, 143 N. Y. 100; People *ex rel.* McShane *v.* Hagen, 48 App. Div. 203; affirmed 164 N. Y. 570; People *v.* Wright, N. Y. L. J. Dec. 8, 1914, Deuel, C. M.) The letter and spirit of the provision contemplate that the voter's presence in one place and absence from another should be temporary in character and preserve his former residence, notwithstanding his absence therefrom. (Matter of Garvey, 147 N. Y. 117.) The mere intention to change his residence will not suffice. (Matter of

Barry, 164 N. Y. 18.) The intention must exist, but must concur with and be manifested by resultant acts which are wholly independent and outside of the mere presence in the new district and should be very clear and convincing to overcome the natural presumption. (Matter of Goodman, 146 N. Y. 284.)

Location of Polling Place: The provision of the constitution that a voter must vote in the election district of which he is a resident "and not elsewhere," means that he must vote at the polling place designated for such district. His vote is not void if the polling place is just without the district, so that he actually votes outside the district of which he is a resident. (People *ex rel.* Lardner *v.* Carson, 155 N. Y. 491.)

Military Service: The constitution also provides that, in time of war, no elector in the actual military service of the state or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from his election district. (Article 2, Sec. 1.)

ARTICLE V

REGISTRATION

The constitution, while authorizing the legislature to make laws "for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage and for the registration of voters," prescribes that such registration "shall be completed at least ten days before each election;" that it "shall not be required for town and village elections except by express provision of law;" and that, "in cities and villages having five thousand inhabitants or more, voters shall be registered upon personal application only; but voters not residing in such cities or villages

shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters." (Article 2, Sec. 4.)

Registration Made a Felony: The provision directing the legislature to make laws for the registration of voters was obviously violated by a law, signed by Governor Sulzer in 1913, to the effect that "any person who shall make any application for registration, *as required*" by the provisions of law relating to registration, "shall be guilty of a felony." (Sec. 184, as amended by Laws of 1913, Chapter 587.) This law was subsequently repealed. (Laws of 1913, Chapter 820.)

Registration in Rural Communities: The provision requiring personal registration in cities and villages having five thousand inhabitants or more, and prohibiting a requirement of personal registration, on the first day of registration, in rural communities outside such cities and villages, presents more serious difficulties. In 1911, however, it was authoritatively construed to mean that the legislature cannot enact laws requiring personal registration on the *first* day of registration in such rural communities, even as to first voters and citizens who did not vote at the last election, but "proper proofs" may be required by the legislature and, within the limits of reason, the nature of the proof is under its control, except that proof involving personal appearance cannot be required on the first day. Proof by affidavit or by the testimony of third persons may be required by statute so long as there is not an arbitrary selection of the affiants (Rupert *v.* Rees, 212 N. Y. 514), but if the proof so required is furnished at the first meeting, to the satisfaction of the inspectors, the legislature can neither authorize nor require those officers to refuse to regis-

ter without the personal appearance of the applicant. (Fraser *v.* Brown, 203 N. Y. 136.)

Schieffelin v. Komfort: The most important litigation respecting the provisions of the constitution in respect to registration is Schieffelin *v.* Komfort (212 N. Y. 520; 163 App. Div. 741; 86 Misc. 678). The action was a taxpayer's suit for an injunction, restraining the various boards of election throughout the state from taking the necessary steps for an election of delegates to the Constitutional Convention. The plaintiff contended (1) that he had proved that enough fraudulent votes had been cast to upset the majority certified to have been cast in favor of the question submitted; (2) that the blank and void votes should have been counted as against the proposition; (3) that, inasmuch as Chapter 819 of the Laws of 1913, pursuant to which the question was submitted, did not provide for a new registration for such submission but only for a correction of the registration of 1913, it violated Section 4 of Article 2 of the constitution, and (4) that that act was also unconstitutional in that it provided that the registration might be corrected on the second Saturday before the election, in that such provision did not comply with the provision of Section 4 of Article 2, that registration "shall be completed at least ten days before each election." The only two propositions urged at Special Term were the first and fourth. Seabury, J., denied the motion. He held that, on the figures presented to him, a clear majority of the voters voted in favor of the question submitted. On the fourth proposition, he held that Saturday, March 28th, was ten days before Tuesday, April 7th and was therefore in compliance and not in conflict with the provisions of the constitution. "The fact that the registration is not completed at least two hundred and forty hours before the opening of the polls on election

day does not render the statute in question offensive to the constitutional provision." "It would be the extreme of technicality to seize upon a fraction of a day for ground for declaring unconstitutional an act of the legislature and to nullify a vote of the people upon this proposition upon a ground so unsubstantial and immaterial." His decision on this point is supported by People *v.* Burgess (153 N. Y. 561, 573); Aultman *v.* Syme (163 N. Y. 54, 61); People *ex rel.* Hart *v.* Goodrich (92 App. Div. 445; affirmed on opinion of O'Brien, J., below, 180 N. Y. 522); State *ex rel.* Stock *v.* Schnierle (5 Rich. 299); and Stroud *v.* Water Co. (56 N. J. L. 422). In other words, Queen *v.* Justices of Shropshire (8 Adolph & Ellis, 173) is no longer the law of this state or country. "The prevailing and apparently the modern rule is different." (49 L. R. A., note, 203.)

The Appellate Division, by a majority vote, indicated its opinion to be that, if the submission was an election within the meaning of Section 4 of Article 2 of the constitution, the constitution was not complied with, because the act did not provide for an original registration of voters. It held, however, that Section 2 of Article 14 of the constitution, providing for the submission, was complete in itself and that the submission of a question to the voters is not an "election." Its decision on the latter point is sustained by Thornton *v.* Washington (3 Washington Terr. n. s. 482, 490); State *ex rel.* Porter *v.* Crook (126 Ala. 600); Mayor *v.* Shattuck (19 Col. 104, 112); Seaman *v.* Baughman (82 Iowa 216, 220); Coggeshall *v.* Des Moines (138 Iowa 730); Bew *v.* State (71 Miss. 1). While the majority of this court did not write any opinion on the question whether the blank and void ballots cast should have been counted as against the

proposition, the necessary effect of its determination was that they should not be counted, and the court's determination in this respect is supported by Smith *v.* Proctor (130 N. Y. 319); May *v.* Bermel (20 App. Div. 53); Hopkins *v.* Duluth (81 Minn. 189); City of Santa Rosa *v.* Bower (15 Pac. 829); St. Joseph Township *v.* Rogers (16 Wallace 644); and Carroll *v.* Smith (111 U. S. 556).

The Court of Appeals held that there was no authority for a taxpayer's action (Matter of Reynolds, 202 N. Y. 430; County of Albany *v.* Hooker, 204 N. Y. 19) and that the courts have no inherent power to supervise the acts of other departments of government unless the civil property or personal rights of a party to the litigation are affected. "Jurisdiction, being the power to hear and determine, is not given to the courts as guardians of the rights of people generally against illegal acts of the executive or legislative branches of government." The Court of Appeals expressly stated that nothing contained in its opinion should be construed as an intimation that, if the court had jurisdiction of the subject of the action, it would deem the statute in question or the special election held thereunder to be invalid.

Indeed, it seems that, even if the constitution imposed on the legislature the duty of providing for a registration for every general and special election and for every submission (a proposition which was strenuously urged by counsel for the plaintiff and strenuously opposed by counsel for the defendants), it would not necessarily follow that the failure of the legislature to make such registration would render nugatory the votes of a majority of those voting on a proposition at a special election. (People *ex rel.* Lardner *v.* Carson, 155 N. Y. 491, 502, 503; Opinions of Hon. Edgar M. Cullen and Francis Lynde Stetson,

Esq., to Governor Glynn, March, 1914.) If this were otherwise, every one of the numerous special elections held since the enactment of the constitution of 1894 would be unconstitutional. (See, however, McConaghy *v.* Secretary of State, 106 Minn. 392; Durfee *v.* Harper, 22 Mont. 354; Ellingham *v.* Dye, 99 N. E. Rep. 1; and Louisiana *v.* American Sugar Refining Co., La. Supreme Court, May, 1915.)

ARTICLE VI

SECRECY

The first constitution of the state (1777) directed the legislature as soon as might be possible after the termination of the Revolutionary War to pass an act for holding all elections by ballot (People *ex rel.* Deister *v.* Wintermute, 194 N. Y. 99, 104), and the present constitution provides that "all elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." (Article 2, Sec. 5.) Voting machines are lawful. (People *ex rel.* Deister *v.* Wintermute, *supra.*) Town officers may be elected, if the legislature so prescribes, by a show of hands. (People *ex rel.* Clancy *v.* Supervisors, 139 N. Y. 524, 528.)

ARTICLE VII

BIPARTISAN BOARDS

The constitution provides that "all laws creating, regulating or affecting boards of officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal rep-

resentation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties, respectively, as the legislature may direct." These provisions "do not apply to town meetings, or to village elections." (Article 2, Sec. 6.)

These provisions have been construed to mean that the constitution places the administration of elections in these boards and the courts have no inherent power of review (*post*, p. 157).

The reference to the highest and next highest votes cast is to votes cast in the state and not to votes cast in any particular locality. (Matter of Knollin, 59 Misc. 373, affirmed, on opinion of Andrews, J., below, 128 App. Div. 908, affirmed 196 N. Y. 526; Carmody, A.-G., A.-G. Rep. of 1913, 307, distinguishing People *ex rel.* Bonheur *v.* Christ, 208 N. Y. 6.)

ARTICLE VIII

PRIVATE OR LOCAL LAWS

The constitution provides that "the legislature shall not pass a private or local bill" "regulating the opening and conducting of elections or designating places of voting." (Article 3, Sec. 18.)

Legislation which imposes greater restrictions on voters in New York City than on voters in country districts does not necessarily violate this provision, and a law which requires voters in New York City, when registering, not only to answer a long list of questions, but also to sign their names, is constitutional. (Ahern *v.* Elder, 195 N. Y. 493.)

The constitution provides that "all elections of city officers, including supervisors and judicial officers of inferior local courts, elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year." The obvious purpose of this provision is to separate the election of city officers from the election of state officers, so that the two would not occur in the same year. (Delehanty *v.* Britt, 212 N. Y. 457. See also Trounstine *v.* Britt, 212 N. Y. 421; Lynch *v.* Britt, 212 N. Y. 580.)

ARTICLE IX

VACANCIES IN PUBLIC OFFICE

The constitution authorizes the legislature "to provide for filling vacancies in office," but provides that, "in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy." (Article 10, Sec. 5.) The prohibition of this provision, however, relates only to officers made elective by the constitution itself; and where the legislature creates an office, it may constitutionally provide that a person appointed to fill a vacancy therein may hold office beyond the commencement of the political year next succeeding the first annual election after the happening of the vacancy, and for the full balance of the

term. If the legislature does so provide, an election to fill the vacancy at the first annual election after the happening thereof is unauthorized and void. (People *ex rel.* Hatfield v. Comstock, 78 N. Y. 356.) Similarly, the words, "except to fill vacancies," contained in the provision of the constitution providing that certain municipal and other elections, except to fill vacancies, shall be held in odd-numbered years (Article 12, Sec. 3, *ante,* p. 25) are permissive and not mandatory, and the legislature may constitutionally provide that a person appointed to fill a vacancy in an office created by it may hold office beyond an even-numbered year, until the first day of January after the next municipal election in an odd-numbered year. (People *ex rel.* Ward *v.* Scheu, 167 N. Y. 292.)

ARTICLE X

OATH OF OFFICE

The constitution provides that members of the legislature and all officers, executive and judicial, except such inferior officers as shall be by law exempted, must take an oath, therein prescribed, before they enter on the duties of their respective offices; and no other oath, declaration or test shall be required as a qualification for any office of public trust. (Article 13, Sec. 1.)

Construing this constitutional provision, it has been held that the imposing of a test, by means of which to secure the qualification of a candidate of a nature to enable him to properly and intelligently perform the duties of the office, does not violate this provision (Rogers *v.* Common Council, 123 N. Y. 173, 186–190); but statutes have been held to be unconstitutional

which penalize, with forfeiture of office, an excise commissioner who fails to take an oath that he is not interested in the manufacture or sale of intoxicating liquors (People *ex rel.* Bishop *v.* Palen, 74 Hun 289); or a candidate who shall fail to file a statement of his election expenses within a prescribed period after election. (Striker *v.* Churchill, 39 Misc. 578; Sulzer Impeachment Trial, p. 341, citing Saxe, on Elections.)

ARTICLE XI

CONSTITUTIONAL CONVENTION OF 1915

The Constitutional Convention which met on April 6, 1915, was decided upon and elected pursuant to the constitution, Article 14, and Laws of 1913, Chap. 819. An attempt to restrain the election of delegates by injunction was unsuccessful. (Schieffelin *v.* Komfort, *ante,* p. 20.) The existing constitutional and legislative law respecting the Convention is as follows.

The Constitution: The constitution provides that the delegates shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the constitution shall be submitted for approval to the electors, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such offi-

cers, employees and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal and proceedings. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, such constitution or constitutional amendment shall go into effect on the first day of January next after such approval.

Laws of 1913, Chap. 819: The statute pursuant to which the convention was decided upon and the delegates were elected provides that it shall be the duty of the secretary of state to call the convention to order, and preside at all meetings thereof until a temporary chairman, president or other presiding officer, either temporary or permanent, shall have been elected by such convention and shall have taken his seat, but the secretary of state shall have no vote therein unless he be a duly elected delegate to such convention. All public officers, boards and commissions shall promptly furnish such convention or any committee

thereof with all such information, papers, statements, books or other public documents in their possession as the convention or such committee shall order or require for use at any time during the session of the convention. It shall be the duty of the secretary of state, the attorney-general, and the comptroller who shall be in office on January 10, 1915, to cause to be prepared and ready for such convention a suitable manual, two copies of which shall be furnished to each member and officer of the convention, and the expense of which shall be paid by the treasurer upon the warrant of the comptroller.

Every delegate to the convention shall be privileged from arrest on civil process during his attendance at the session of the convention, except on process issued in any suit brought against him for any forfeiture, misdemeanor or breach of trust in an office or place of public trust held by him. Each delegate shall enjoy the like privilege for the space of fourteen days before and after any such session, and during adjournments thereof, or when absent with leave of the convention. No officer of the convention, while in actual attendance upon the same, shall be liable to arrest on civil process. For any speech or debate in the convention, the delegates shall not be questioned in any other place. The convention shall have the power to expel any of its members and to punish its members and officers for disorderly behavior, by imprisonment or otherwise, but no member shall be expelled until the report of a committee appointed to inquire into the facts alleged as the ground for such expulsion shall have been received by the convention. The convention shall have the power to punish as a contempt and by imprisonment or otherwise, a breach of its privilege or of the privileges of its members, but such powers shall not

be exercised except against persons guilty of one or more of the following offenses:

1. The offense of arresting a member or officer of the convention in violation of his privilege from arrest as hereinbefore declared.

2. The offense of disorderly conduct in the immediate view and presence of the convention and directly tending to interrupt and disturb its proceedings.

3. The offense of publishing any false and malicious report of the proceedings of the convention or of the conduct of an officer or delegate in his official capacity.

4. That of refusing to attend or be examined as a witness or to produce papers and documents called for by subpœna either before the convention or a committee thereof, or before any person authorized by the convention or by a committee thereof to take testimony in the proceedings of the convention.

5. That of giving or offering a bribe to any member or of attempting by menace or other corrupt means, or inducement or device, directly or indirectly, to control or influence a member in his vote or other official conduct in or in relation to the convention.

In any case in which the convention shall punish any person by imprisonment, such imprisonment shall not extend beyond the session of the convention.

Part Second

THE ELECTION LAW

ARTICLE I

THE NEW YORK SYSTEM OF ELECTIONS

Title 1.—Election Laws

Elections: The Election Law consists of a statute containing five hundred and sixty-two sections. It deals with elections, first, general elections, at which all the voters elect public officers from various candidates for election previously nominated by parties and independent bodies, and, second, primary elections, at which party voters nominate party candidates from various candidates for nomination previously designated by party committees and party petitioners. Independent bodies nominate independent candidates by petition, not by primary election. Any system of elections also involves many other matters which the experience of time has ingrafted upon the exercise of the franchise, and, in New York State, the bewildering multitude of detail is responsible for the general ignorance of the fundamental principles of election law. There cannot, however, be an election without an election law. Some authority is necessary. "A few voters putting tickets in a box do not alone make an election." (People *ex rel.* Woods *v.* Crissey, 91 N. Y. 616, 634; People *ex rel.* Deitz *v.* Hogan, 214 N. Y. 216.)

Election Law of 1842: In 1842, the legislature enacted a general election law, entitled "An act respect-

ing elections other than for militia and town officers." This law remained in force with some amendments and supplemental acts from 1842 to 1890. (Laws of 1842, Chap. 130.)

Ballot Reform Act of 1890: In 1890, the legislature enacted the so-called "Ballot Reform Act" (Laws of 1890, Chap. 262), which bore the significant title "An act to promote the independence of voters at public elections, enforce the secrecy of the ballot and provide for the printing and distribution of ballots at public expense." That act inaugurated the voting booth, prohibited electioneering within one hundred and fifty feet of the polling place, took the burden of printing and distributing ballots from the party organizations and placed it upon the public generally, and throughout "teemed" with provisions guarding against the frauds upon the ballot that experience had shown to be possible. (People *ex rel.* Coffey *v.* Democratic Committee, 164 N. Y. 335, 338–9.) Its primary object was to enable the voter to cast his ballot without the possibility of revealing, by the act of voting, the identity or political complexion of the candidates for whom he voted (People *ex rel.* Nichols *v.* Board of Canvassers, 129 N. Y. 395), and it undoubtedly marked a long stride forward in the direction of election reform.

Acts of 1895 and 1896: Since the enactment of the Ballot Reform Act, the election law has been amended, in many respects, so as to guard against frauds at elections. In 1895, separate party ballots were replaced by a single official ballot (Laws of 1895, Chap. 810); but the ballot so created, while improving conditions over no official ballot at all, was the cumbersome blanket party-column ballot which was used continuously until the adoption of the Massachusetts form

of ballot by the Massachusetts Ballot Act of December, 1913. In 1896, the election law was rewritten by "an act in relation to the elections, constituting chapter six of the general laws." (Laws of 1896, Chap. 909.)

Party Organization Under Ballot Reform Act: The Ballot Reform Act of 1890 and the Election Law of 1896 did not concern themselves particularly with party organization and, for a number of years after their enactment, party committees, such as a county general committee, continued to be voluntary political associations. Membership on such a committee was a privilege which might be accorded or withheld by the majority members of the committee, who could refuse to recognize the choice of a given constituency until such time as the voters in that constituency should conclude to elect a delegate who would be agreeable to the wishes of the majority. (McKane *v.* Adams, 123 N. Y. 609.) Thus there arose a demand for a primary law sufficiently comprehensive to assure to all party voters equal rights at primary elections and conventions and on political committees.

Primary Laws of 1898–9: In 1898 and 1899, the legislature attempted to meet this further demand by the enactment of new primary laws. (Laws of 1898, Chap. 179, as amended by Laws of 1899, Chap. 473.) These new laws recognized, for the first time, that primary elections are, in many respects, as important as general elections and modeled the conduct of primary elections upon the conduct of general elections. They provided for the enrollment of the voter, and for voting booths, challengers and watchers and so on. The voluntary character of certain committees, such as the county committee, was destroyed and membership thereon became a matter of right by virtue of

election thereto at a primary election, and the majority members of the committee became powerless to remove a duly elected member on any pretext whatever. (People *ex rel.* Coffey *v.* Democratic Committee, 164 N. Y. 335; People *ex rel.* Hahn *v.* Republican Committee, 124 App. Div. 427. Compare People *ex rel.* Garvey v. Democratic Committee, 175 N. Y. 415.) In other words, the new primary laws created a scheme which authorized voters to construct their party organization from the bottom upwards, instead of permitting bosses to construct it from the top downwards. (People *ex rel.* Coffey *v.* Democratic Committee, *supra.*) And the present law declares the articles dealing with enrollment, party organization, party nomination and conduct of primary elections to be "controlling" on the method of enrolling the voters of a party; the organization and conduct of party committees; the method of electing members of party committees, and delegates and alternates to national party conventions; and the nomination by parties of candidates for offices, except town, village and school district officers. (Sec. 2, as amended by Laws of 1913, Chap. 820.)

The Campaign for Direct Primaries: The system inaugurated by the primary laws of 1898–9, while another step in advance, provided for an *indirect* system of primary nominations, wherein the voter, at primaries, voted merely for delegates to a convention, which, in turn, made nominations. Thus, there arose a demand for "direct" nominations or "direct" primaries wherein the voter, at primaries, would vote directly for his choice for the candidates of his party instead of for delegates. This campaign for direct primaries appears to have been started in 1906, by William R. Hearst, in his gubernatorial cam-

paign against Charles E. Hughes; and shortly after Governor Hughes was elected, as Mr. Hearst pointed out at an Independence League meeting in 1908, "the bill which used to sit around the Independence League headquarters, clothed, as it were, in contumely," was to be seen "arrayed in the frock coat of respectability and the patent leathers of prosperity, walking up the avenue, arm in arm, with Governor Hughes." (Proceedings of Joint Committee, p. 2222.)

The Hughes System: In attempting to follow the history of direct primaries, or to pass understandingly upon the merits of direct primaries and the progress and reforms which have been effected or remain to be effected, it must be borne in mind that Governor Hughes advocated a distinct departure from the direct primaries of the west. Under the western system, all candidates for nomination are named by petition. The party machines are petitioners in just the same way as anti-machine party members, and both file their petitions within precisely the same time limits. Under the Hughes system, however, party "designating committees," representing the machine, are legalized and are expressly required to make their designations *prior to the anti-machine groups,* who are thus afforded a valuable *period of opportunity* in which to examine the designations made by the machine committees and, if so advised, to prepare an intelligent contest. This is in sharp contrast to western direct primaries which do not afford any period of opportunity whatsoever.

Legislative Investigation: Governor Hughes did not succeed in placing any direct primary legislation upon the statute books, but, in April, 1909, the legislature appointed a joint committee to investigate the subject. This committee took testimony in various states

which had had previous experience in the workings of direct primary laws, and in February, 1910, made its report, wherein it recommended certain amendments to the law, but stated its belief "that it will be unwise, for the present at least, to depart from the historic representative system under which the political affairs of the state have been so long administered. (Proceedings of Joint Committee, p. 218.)

Arguments For and Against Direct Primaries: This committee's report is most interesting and any student who desires to comprehend the arguments for and against direct primaries will be well repaid in reading it. If so long and comprehensive a report can be summarized in a single paragraph, it might be said that the advocates of direct primaries claim that direct primaries, by reason of the added *opportunity* afforded to all voters alike, are the only fair method to check "boss rule" and permit "the people" to choose their own candidates for nomination, while the opponents assert that the principle underlying direct primaries is a "pure democracy" instead of representative government; that their tendency is to wreck the American party system, to eliminate party principles and party government and to substitute a government by self-seeking office holders; that they necessarily result in more frequent elections, doubling expenses and tending to keep the public mind in a condition of unrest; that they are not so well adapted to large communities as the convention system; and that they discriminate unfairly against the man of worth and ability in moderate means because of the expense involved and because they invite the demagogue to institute personal campaigns conducted in a manner with which statesmen will not compete.

Consolidated Election Law of 1909: In 1909, the legislature consolidated the election law, the primary

election law and other separate laws into a new election law. (Laws of 1909, Chap. 22.) The various laws hereinafter mentioned (*post,* pages 37 to 38) *are all amendments to this consolidated election law;* and the "Election Law" (Sec. 1), thus consolidated and amended and as prepared under the direction of the Secretary of State, is annexed hereto in full.

Levy Law of 1911: In 1911, the legislature enacted a law (Laws of 1911, Chap. 649), which contained many remedial features and two provisions which the courts subsequently held to be unconstitutional. This was known as the "Levy Law," and because of the criticism directed at one of the two unconstitutional provisions, the value of the remedial features has been generally ignored.

Direct Primary Law of 1911: The legislature of 1911, during the administration of Governor John A. Dix, also wrote the first direct primary law in New York upon the statute books. (Laws of 1911, Chap. 891.) This law abolished the convention system of nominating, except for candidates for office to be voted for by all the voters of the state, and substituted a state-wide system of direct primaries operating both in rural communities and city districts. Congressmen, state senators, assemblymen, supervisors, mayors, justices of the supreme court and aldermen, all officers, in fact, except officers to be voted for by all the voters in the state, had to contest for their nominations at primary elections held by their respective parties. The Hughes system (*ante,* p. 35) was retained, party designating committees being legalized and required to make the machine designations *five days* before anti-machine groups were called upon to act.

Massachusetts Ballot and Direct Primary Laws of December, 1913: In December, 1913, the legislature enacted a Massachusetts ballot law for general elections, choosing the Saxe-Dana bill of 1912, which had been reintroduced as the Herrick-Carver bill of 1913. It also enacted a comprehensive direct primary law which abolished the state convention and made state officers subject to popular nomination at primaries, repealed the Hughes system requiring the machine to designate before anti-machine groups (substituting the western system) and made a great many other changes in the text of the election law.

Act of 1915: The sole contribution of the legislature of 1915 was a "party measure" (Laws of 1915, Chap. 678), reducing the number of superintendents of election, increasing the number of deputy superintendents and providing for additional safeguards for primary elections in New York city. This act has some remedial features; but it is, at best, a familiar example of the time-honored discriminatory legislation annually enacted by Republican legislatures, increasing the strictness of elections for New York city and encouraging partisan intimidation therein, while permitting loose and unprotected elections upstate. The act also contains a "joker," shearing deputy superintendents of election of their powers to perform, "on their own motion," the duties for which they are appointed. (See *post,* p. 143.)

TITLE 2.—FUNDAMENTAL DISTINCTIONS

Elections Distinguished: It has already been pointed out that all the voters vote at general elections, where they elect public officers from various candidates for

election previously nominated by party and independent nominations, whereas only *party* voters vote at primary elections (democrats at democratic primaries, republicans at republican primaries, and so on) and, instead of *electing*, merely *nominate* party candidates and instead of making their choice from nominees, make it from designees,* that is from candidates for nomination previously designated by petition.

Independent Nominations and Designations: Independent nominations and designations are usually confused, presumably because both are made by petition; but they are absolutely distinct and have nothing whatever in common. *All designations are exclusively party designations. There is no such thing as an independent designation.* No one except enrolled party voters can participate in any designation, and a designation is merely a preliminary step in the making of a party nomination. When each party makes all its designations, it holds its primary election and selects, by a vote of its party voters, its candidates for nomination. In other words, a primary election is a first *or primary* election held to choose party candidates for a coming general election. Independent nominations, however, have nothing to do with parties. They are made independently of party machinery. When each party has completed all its nominations, the law provides for nominations by voters by petition independently of parties, and it is these nominations which are independent nominations.

TITLE 3.— IMPORTANT ELECTION REFORMS OF 1913

Massachusetts Ballot Act: With the enactment of the Massachusetts Ballot Act of 1913, providing for the use of the Massachusetts form of ballot at *general*

* NOTE.— The word "designees" is novel and does not appear in the election law. It is justified, however, as being needed.

elections, intelligent election reform achieves its furthermost step. In the first edition of this book, this reform was urged in the following language: "The important election is the general annual November election, and all the machinery of any system of elections culminates when each voter casts his single vote at that election; so that the most important reforms are obviously those which will produce the greatest simplicity in voting at general elections and afford the greatest opportunity to voters to vote intelligently at general elections. *The most important of all election reforms, therefore, is the Massachusetts ballot, far more important, for instance, than any primary reform, which can affect nominations only.* The Massachusetts ballot, especially with emblems, is fairer than the New York ballot both for voter and for candidate, more likely to produce intelligent voting and elect worthy candidates and much simpler to vote and to count. Voters are prone to think little enough in any event and a requirement that each voter must make one annual voting mark for each and every candidate for whom he wishes to vote is not too onerous, but, on the contrary, should act as a mild stimulant to more intelligent voting. The Massachusetts ballot affords each candidate an opportunity regardless of party. Under the present law (*i. e.*, the former law repealed by the act of 1913), straight lists of candidates are annually elected to office. Although many of these candidates would not have a fighting chance in a single-handed contest against their opponents on the merits, yet they are elected by the column ballot, because of a distinguished standard-bearer at the head of his ticket, or because of a fusion between two minority parties on all except the head of the ticket,

or because of the importance of some party principle and the indifference and laziness of the voter who is required to make but one cross. Fifteen years ago the court of appeals criticised the 'obscure and cumbersome nature' of the present law and declared that 'the public records show that at every election in this state many thousands of votes cast by the electors are rejected for some defect in the ballots used and which are condemned or supposed to be condemned by the statute as void,' and the court thereupon appealed to the legislature, saying that 'the process of voting to many uneducated persons and to some who are educated, is so difficult that votes enough are thrown out by the canvassers in some cases to determine the result of the election. Whether it is wise to so frame laws that govern the casting and counting of votes at an election in such a way as to render it very difficult, if not impossible, for many of the electors to deposit a valid ballot in the ballot box, is a question for the legislature. It is quite apparent that, under the present system, the result of an election is not always determined by the will of the majority, since, unless they comply with all the provisions of the statute, their votes cannot be counted.' (People *ex rel.* Feeny *v.* Board of Canvassers, 156 N. Y. 36, 44–45.) More recently, Bartlett and Vann, JJ., declared: 'The present law has many defects, particularly in regard to the form of the ballot and the mode of voting the same, and radical amendments are required to secure a fair election without disfranchising a large number of voters by reason of complicated provisions that are not readily understood.' (Hearst *v.* Woelper, 183 N. Y. 274, 291.) "The 'obscure and cumbersome nature' of the present law (now repealed, as afore-

said) also puts a premium on straight voting and, in estimating the relative fairness of the Massachusetts and New York forms of ballot, there must be charged against the latter not only the 'many thousands of votes rejected for some defect in the ballot,' but also many additional thousands of votes cast by voters who vote a straight ticket every year, lest, by attempting more intelligent choice of men rather than parties, they may be wholly disfranchised by some mistake in marking the ballot." (Saxe, on Elections, 1st ed., pp. 101–103.)

Significance of Massachusetts Ballot Law: The significance of the enactment of the Massachusetts ballot lies in the fact that it relegates party primaries to the subordinate position where they belong. Demagogues may wrestle with more worthy men at primary elections and win and secure party nominations, but, if they succeed, they may be met by intelligent *independent* nominations and a new contest at a general election, upon a ballot which affords the independent candidates fair opportunity to conduct a successful campaign.

TITLE 4.—FURTHER ELECTION REFORM

With the enactment of the two laws of December, 1913, therefore, it would seem that election reform might well pause for a time, so that the present laws may have a fair trial.

Short Ballot: The chief reform, however, which still seems to have a group of persistent advocates, is the so-called "short ballot." The term "short ballot" is a misnomer. Its advocates, as such, are not concerned with the form of the ballot, but they seek to reduce the number of elective officers and thus center responsibility on the fewer officers who are elected.

The principle of the "short ballot," as defined by the National Short Ballot Organization, is as follows: "First—that only those offices should be elective which are important enough to attract (and deserve) public examination. Second—that very few offices should be filled by election at one time, so as to permit adequate and unconfused public examination of the candidates, and so as to facilitate the free and intelligent making of original tickets by any voter for himself unaided by political specialists." The importance of the principle is obvious. Its application, however, is always a question of degree. In New York State, most state government officials are appointed and only a few state officers and the members of the legislature are elected. Where should the line be drawn?

ARTICLE II

ENROLLMENT OF VOTERS

TITLE 1.—IN GENERAL

Parties: The election law defines the term "party" to mean any political organization which at the last preceding election for governor polled at least ten thousand votes for governor (Sec. 3, subdiv. 8, as amended by Laws of 1913, Chap. 820) and recognizes in the fullest way the existence of parties as political organizations with enrolled memberships and officers and committees chosen by and from the members. Parties are not close corporations selecting their own members, but any voter is entitled to become an enrolled member of any party and to participate in its government, providing he complies with the statutory tests, which consist only of his own declaration as to his political sympathies and intentions. A voter may enroll with one party one year and another party the succeeding year (Matter of Duffy, 125 App. Div. 406)

provided that, in such succeeding year, he has not participated in any primary election or convention (Sec. 7).

Enrollment Optional: Enrollment, being a party function, is not mandatory, but optional with the voter. No person can be required to enroll, nor does his failure to do so affect his right to register for the purpose of voting at any election, or to vote at any election except a primary election (Sec. 21). Only enrolled voters are entitled to participate in the official primary elections of their respective parties (Sec. 19). The intent of the law is to make it a prerequisite of voting at a primary that the voter enrolled in the *same* election district as that in which he offers his vote; but there is a Special Term decision holding that an enrolled voter may require his vote to be received in a different election district. (Matter of Steinbrink, Benedict, J., September 28, 1914, appeal pending.) No voter can take part in any primary election of any party other than the party in which he shall at the time be enrolled. No voter who has once enrolled in a political party is permitted to enroll in another political party before the first day of the next registration (Sec. 19).

TITLE 2.—PARAPHERNALIA

The custodian of primary records, that is, the board of elections (Sec. 202), whose duty it is to provide official ballots for general elections (Sec. 3, subdiv. 7), must furnish the paraphernalia of enrollment, which include enrollment books (Secs. 4–5), election booths and the same articles as are required by law to be placed in voting booths for a general election, enrollment boxes (Sec. 6) and also enrollment blanks, with envelopes (Sec. 7).

In New York city, enrollment and registration are now recorded in the same book (Sec. 155, subdiv. 2, as amended by Laws of 1915, Chap. 678). The law

defines the term "enrollment books," when applied to those used in New York city, to mean the registers (Sec. 3, definition 19, added by Laws of 1915, Chap. 678).

Outside of New York city the enrollment books are of the same simple character generally in use until the amendment of 1915 (Sec. 5).

TITLE 3.—MANNER OF ENROLLMENT

A voter, who chooses to enroll, enrolls in one year for the succeeding calendar year, commencing on the first day of January following enrollment. Such enrollment remains in force one year (Sec. 18). If he presents himself personally for registration on a registration day, he enrolls on such registration day, after registering (Sec. 8). Where personal registration is not required and he has not registered personally, he enrolls on election day, after voting (Sec. 9). A voter enrolls by entering a booth and making a cross mark in a circle under the party emblem of the party of his selection, upon the enrollment blank provided for that purpose, on which is printed a statement that the voter solemnly declares, among other things, that he is "in general sympathy with the principles of the party" designated and that it is his "intention to support generally at the next general election, state or national, the nominees of such party for state or national offices" and that he has not enrolled with or participated in any primary election or convention of any other party since the first day of the preceding January (Sec. 7). One mark crossing any other mark at any angle within the circle constitutes a cross mark (Sec. 10). The law contains a provision that the voter use a pencil having black lead (Sec. 10), but this is directory only. (Matter of Kirk, 66 Misc. 535.) The voter encloses the enrollment blank in the envel-

ope, seals the envelope and deposits it in the enrollment box (Sec. 10). The inspectors write the voter's number and residence in the enrollment book (Secs. 8–9) and indicate that the voter has enrolled by placing the word "yes" after his name (Sec. 10).

TITLE 4.— CANVASS OF ENROLLMENT

The enrollment books are sealed in envelopes and they and the boxes are returned to the custodian of primary records, who keeps them unopened until the Tuesday after election day (Secs. 12, 13). The envelopes are then opened and enrollment is completed by the custodian by entering against the various voters' names in the enrollment books, the name of the party with which each has enrolled (Sec. 14).

TITLE 5.— CORRECTING ERRONEOUS ENROLLMENT

Prior to 1912, a voter who enrolled with the wrong party had no redress (Jackson *v.* Britt, 147 App. Div. 87; People *ex rel.* Smith *v.* York, 34 Misc. 120), but an amendment enacted in 1912 authorizes a voter who has been enrolled with the same party for five years and enrolls with another party by inadvertence to correct his enrollment by filing a declaration in a prescribed form (Sec. 14a, added by Laws of 1912, Chap. 52).

TITLE 6.— ENROLLMENT FOR A NEW POLITICAL PARTY

In 1913, the legislature, at the instance of the national progressive party, which became a party at the election of 1912, passed a law providing for the enrollment of a new political party (Sec. 15, as amended by Laws of 1913, Chap. 587).

TITLE 7.— SPECIAL ENROLLMENT UPON COMING OF AGE

A law enacted in 1914 permits any voter who shall become of age after the last preceding general election

to become specially enrolled with any party by filing a statement embodying an appropriate declaration of qualification, sympathy and intention. The necessary forms must be supplied by the boards of election. Such enrollment may be accomplished on or before the fourth Tuesday preceding an official primary (Sec. 14B, added by Laws of 1914, Chap. 244.)

TITLE 8.—ENROLLMENT BOOKS

Original Books: The original enrollment books are used at official primary elections (Sec. 18). They are public records, except for the period during which they are sealed (Sec. 21).

Duplicate Books: The custodian of primary records must annually provide for each party and deliver to the chairman of its proper general committee a true copy of so much of the enrollment books as will give the name, address and political affiliation of each voter (Sec. 16). These books are used at unofficial primaries (Sec. 17).

TITLE 9.—PUBLICATION OF ENROLLMENT

The law makes provision for the publication of enrollment. This is mandatory in New York city and in any county containing a city of the first or second class. Elsewhere, it may be done only where authorized by the appropriate board of supervisors. (Sec. 22, as amended by Laws of 1914, Chap. 244.)

ARTICLE III

PARTY ORGANIZATION

TITLE 1.—POLITICAL SUBDIVISIONS OF THE STATE

Subdivisions of the State: The state of New York is variously divided into civil and political divisions as follows: (1) Counties, containing one or more assembly districts. (2) Congressional districts. (3) Senate districts, also containing assembly districts. (4) Cities and towns. (Revised Statutes, Chap. 2, and acts supplemental thereto and amendatory thereof, *not* consolidated.)

Election District: Every town and every ward of a city not subdivided into election districts constitutes in itself an election district. The town boards of towns containing more than four hundred voters, the common council of every city, except New York city and Buffalo, in which there is a ward containing more than four hundred voters, and the boards of elections of New York city and Buffalo, have jurisdiction, although a limited jurisdiction, to divide such towns and cities into election districts. Each election district shall be compact in form and contain as near as may be three hundred voters, except in the city of New York, where it shall contain three hundred and fifty voters. No election district may contain portions of two counties or two senate or assembly districts. (Sec. 296, as amended by Laws of 1914, Chap. 244.) Assembly districts are created by the legislature and are permanent in character. Election districts are created by local bodies and are transitory in character, varying according to variation in population.

Unit Area of Representation: The election law defines the term " unit of representation " to mean any election district, town, ward of a city, assembly district or any other political subdivision of the state which is the unit from which members of any political committee or delegates to a party convention shall be elected (Sec. 3, definition 6). Prior to the amendment of 1913, the selection of the unit area of representation for delegates to conventions and members of committees was left largely to the rules and regulations of the various parties. (See Saxe, on Elections (ed. 1), pp. 43–5 and cases cited.) Most units are now mandatory.

TITLE 2.— CONVENTIONS

National Conventions: The election law recognizes national conventions and prescribes that the rules and regulations of each party may prescribe that the delegates and alternates thereto may be elected from congressional districts, or partly from the state at large and partly from congressional districts, but such rules shall not provide for the election of more than four delegates and four alternates at large. Delegates and alternates are elected at the spring primaries. (Sec. 53.)

All State Conventions Abolished: The Direct Primary law of 1911 (Laws of 1911, Chap. 891) abolished all conventions in the state, except the state convention, and the Direct Primary Law of 1913 (Laws of 1913, Chap. 820) abolished the state convention, striking the article on conventions (Sec. 45, repealing article 4-b, Secs. 110–114) and even the definition of a convention, from the text of the law. The new law, however, contains a provision that nothing

therein contained shall prevent a party from holding a party convention to be constituted in such manner, and to have such powers in relation to formulating party platforms and policies and the transaction of business relating to party affairs, as the rules and regulations of the party may provide, not inconsistent with the election law. Delegates to any such convention shall not be chosen at official primaries or otherwise at public expense. (Sec. 45.)

Effect of Abolition of State Convention: The action of the legislature in abolishing the state convention, while taken pursuant to a general newspaper demand and what was believed to be a dominant public sentiment, is likely to meet with serious criticism. Two months before such action was taken, an eminent educator expressed himself as follows: "I am of the opinion that in New York state, with its vast area, its nine or ten million inhabitants, its highly diversified industrial and economic conditions, both rural and urban, nothing short of a party convention, with unrestricted opportunity for conference and discussion, can adequately reflect the composite sentiments of the entire party on the subject of the best and strongest candidates for nomination as standard bearers of the party in the state." (Jacob G. Schurman, September 23, 1913). Moreover, inasmuch as any system of direct primaries concededly reaches its highest efficiency in smaller localities, where the voter is comparatively familiar with the candidates whom he desires his party to place in nomination, and inasmuch as direct primaries lose much of their usefulness in greater localities, where most of the voters have only limited knowledge and meagre information respecting candidates for office, it follows that a convention of delegates,

who themselves are elected at state-wide direct primaries, is not only consistent with our system of representative government, but more efficient to intelligently perform the work of selecting a state ticket. It is the logical body to nominate candidates to be voted for by all the voters of the state. The abolition of the state convention imposes great expense on all state officers, including judges of the court of appeals. Every candidate for party nomination will require an organization in every county of the state and, if he is not the choice of the machine, an organization able to cope with the machine's organization, which is a standing army, prepared to fight whenever called upon. As a distinguished citizen of to-day wrote over a quarter of a century ago, "The politicians would not be difficult to beat if the people would organize for their protection and from principle; but it is the matter of organization which is difficult and no one understands this better than the bosses." (Wm. M. Ivins, on Machine Politics, 1887, p. 24.)

Presidential Primaries: Similarly, so-called "presidential primaries," where the voters instruct delegates to a national convention as to party candidates for president, are a sort of extension of the direct primary principle, still untried in New York, which, though advocated in the national platforms of the various parties, overlooks the fact that the usefulness of direct primaries in small localities is lost in large localities and that, in a system of representative government, the nominating of state and national officers may better be left to the united wisdom of delegates after a mutual interchange of ideas at conventions.

TITLE 3.— COMMITTEES

Definition: The term " committee " means any committee chosen in accordance with the provisions of the election law to represent the members of a *party* in any political subdivision of the state (Sec. 3, definition 13).

Party Committees: The election law provides that party committees shall consist of a state committee and county committees (Sec. 35), the members of which are elected at official primary elections (Sec. 38), and such other committees as the rules and regulations of the party may provide (Secs. 35, 39), the members of which must not be chosen at official primaries or otherwise at public expense (Sec. 45).

State Committee: The state committee of each party is constituted by the election from each assembly district of one member who must be an enrolled voter of the party within such district. Each member of a state committee shall be entitled to one vote (Sec. 36).

County Committees: The county committees of each party are constituted by the election in each election district within such county of at least one member, and of such additional members as the rules and regulations of the party may provide for such district, proportional to the party vote in the district for governor at the last preceding gubernatorial election; or, if no additional members are required by the rules, the voting power of each member shall be in proportion to such vote. Each member of a county committee must be an enrolled voter of the party residing in the assembly district containing the election district in which he is elected. Each member of a county committee shall be entitled to one vote (Sec. 37).

Election of Members of State and County Committees: Members of the state committee are elected bi-

ennially in each even numbered year. Members of county committees are elected annually. Elections are held at the fall primaries, except in the year of a presidential election, when they are held at the spring primary. Members of either committee hold office until the election of their successors (Sec. 38).

Organization and Rules of Committees: Every state and county committee, within ten days after their election, must meet and organize and, within three days thereafter, must file with the secretary of state and the board of elections of the county a certificate stating the names and postoffice addresses of their officers. The election law also provides for the preparation of rules and regulations and the amendment thereof (Sec. 40).

Removal: A member of a party committee may be removed by such committee for disloyalty to the party or corruption in office, after notice and a hearing upon written charges (Sec. 42).

Vacancies: Where a vacancy occurs in any state or county committee, such vacancy is filled by the remaining members of the committee by the selection of an enrolled voter of the party qualified for election from the unit of representation as to which said vacancy shall have occurred (Secs. 36, 37, 43).

TITLE 4.—DETERMINATIONS BY PARTY AUTHORITIES

At one stage in the history of the election law a determination of a state convention or state committee was regarded by the courts as conclusive and not subject to review. (Matter of Fairchild, 151 N. Y. 359.) All that now remains are the provisions that, when-

ever contending factions each claim the same name or emblem or the right to designate election officers, preference must be given to the faction recognized by the regularly constituted party authorities (Sec. 125); and in reviewing questions relating to nominations the courts must consider, but need not be controlled by, any action or determination of the regularly constituted party authorities. (Sec. 56; Matter of Heacock, 18 Misc. 311.)

ARTICLE IV

NOMINATIONS, IN GENERAL

TITLE 1.—DEFINITIONS

Nominations: The election law defines the term "nomination" to mean the selection of a candidate for office authorized to be filled at a general election, or a special election held to fill a vacancy in such office (Sec. 3, definition 9). Nominations are of two classes, party nominations (Sec. 45), defined as the selection of a candidate by a party (Sec. 3, definition 15), and independent nominations (Sec. 122), defined as the selection of a candidate by an independent body (Sec. 3, definition 16).

Candidates or Nominees: Candidates or nominees are of the same two classes, party candidates or nominees (Sec. 3, definition 17) and independent candidates or nominees (Sec. 3, definition 18).

TITLE 2.— METHODS OF NOMINATION

Party Nominations, General Officers: Party nominations for all offices to be filled at a general election, except town, village and school district offices and

electors of the president and vice-president of the United States, are made at the fall primary next preceding such election by the enrolled voters of the party (Sec. 45, as amended by Laws of 1913, Chap. 820).

Party Nominations, Presidential Electors: Candidates for the office of presidential electors are nominated by the respective state committees, one for each congressional district, and two at large (Sec. 54).

Party Nominations, Minor Local Officers: Nominations of party candidates for town, village and school district offices shall be made in the manner prescribed by the rules and regulations of the county committee of the county wherein such town, village or school district is located (Sec. 45, as amended by Laws of 1913, Chap. 820).

Special City Elections: Nominations of party candidates for city offices to be filled at a different time from the general election are made at unofficial primaries (Sec. 45).

Party Nominations for Special Elections: Party nomination to an office to be voted for at a special election shall be made in the manner prescribed by the rules and regulations of the respective parties (Sec. 91, as amended by Laws of 1913, Chap. 820).

Independent Nominations: All independent nominations are made by independent certificates of nomination (Sec. 123).

TITLE 3.—SELECTION OF EMBLEMS

Emblems: The election law provides for emblems, both for parties and for independent bodies for the official ballot at general elections. "The emblem is required that the illiterate voter may be secure in his choice." (Matter of Greene, 9 App. Div. 223, affirmed

150 N. Y. 566.) It has even been said that they "are necessary at primaries the same as at general elections, so as to enable the voter to avoid mistakes and vote intelligently" (Hopper *v.* Britt, 204 N. Y. 524, 528), but the primary law substitutes numerals for emblems, which serve the same purpose (Sec. 58, as amended by Laws of 1913, Chap. 820).

The state committee selects the party emblem to designate the candidates of the party and files a certificate showing a representation thereof with the secretary of state. Such emblem, when so filed, shall in no case be used by any other party or independent body. In the case where an independent body nominates, the signatories select their emblem, which must be shown by a representation thereof upon the certificate of nomination. An emblem, when filed, shall be used to designate and distinguish all the candidates of the same party or independent body in all districts of the state and shall continue to be used to designate and distinguish the candidates of such political party or independent body in all districts of the state until changed by the state committee of the party or by the independent body choosing it. An emblem may be any appropriate symbol, except the coat of arms or seal of any state or of the United States, the state or national flag, a religious emblem or symbol, the portrait of any person, the representation of a coin or of the currency of the United States. Existing devices or emblems heretofore chosen pursuant to law shall continue until changed in the manner thus indicated (Sec. 124, as amended by Laws of 1913, Chap. 820).

Time: The law does not authorize designation of an emblem by a certificate in advance of the certificate of nomination (Carmody, A.-G., A.-G. opinions of 1913, September 16, 1913).

Supplying Omitted Emblems: Where the party or independent body fails to select an emblem or, having selected an emblem, is adjudged not to be entitled thereto and thereupon presents no other device, the duty of selecting devolves on the officer with whom the certificate is filed (Secs. 125–126, as amended by Laws of 1914, Chap. 820).

TITLE 4.— CONFLICT IN NAMES OR EMBLEMS AT GENERAL ELECTIONS

Conflicts Between Parties: If the certificates of nomination of two or more different parties or independent bodies select substantially the same name or emblem, the courts are authorized to decide which is entitled to the use thereof, being governed, as far as may be, by priority of use in case of a name, and by priority of selection in case of an emblem.

Conflicts Between Factions: If two or more factions of the same party claim substantially the same name or emblem, the courts must decide between such conflicting claims, giving preference of name and device to the factions recognized by the regularly constituted party authorities (Sec. 125; People *ex rel.* Ward *v.* Roosevelt, 151 N. Y. 369).

Contests Where Bona Fide Opponents Seek to Appropriate Name: During the presidential election of 1896, when the gold democrats at their national convention had adopted the name "National Democratic Party" and nominated presidential electors throughout the country, the New York courts sustained the New York certificate of nomination adopting that name (Matter of Greene, 9 App. Div. 223, affirmed without opinion, 150 N. Y. 566); but they have since refused to permit independent bodies to take the

name of "Social Democratic Party" (Matter of Social Democratic Party, 182 N. Y. 442), or "Independent Democratic Party" (Matter of Carr, 94 App. Div. 493), or "Independent Republican Party" (Matter of Smith, 41 Misc. 501), or "Independent Progressive Party" (Matter of Kaufman, 152 App. Div. 940).

Contests Where Mala Fide Adherents Seek to Appropriate Name or Emblem: There are also other decisions arising out of the attempt of individuals in some particular locality to appropriate for their local candidates the name and emblem of some independent body, such as the Independence League, Civic Alliance, National Progressive or Square Deal Party, which, at the time, is showing signs of becoming an important factor in an approaching general election. In these cases, the claimants to the name and emblem base their claim not in derogation of the right of the central body, but by virtue of it. They assert that they are part and parcel of it. The election law lays down two tests affecting these claims, identity and priority, that is, identity of a claimant or conflicting claimants with the central independent body, and priority between conflicting claimants in the time of filing their nominating certificates. Ordinarily, between conflicting claimants, the certificate first filed under the name and emblem would be entitled to preference; but this is subject to the proviso that it must be filed by the same independent body as the central body, which is usually a question of fact. (Matter of Independent Nominations, 186 N. Y. 266.) In determining this question of fact, the courts have held that, when there is a contest between two bodies, evidenced by two certificates, it is a question of relative good faith between the candidates nominated to fill up the ticket, that is which

ones are in sympathy with the general movement; and that the preferences of the committee in charge of the general ticket should have great weight in determining who shall be placed on its ticket. To hold that a certificate first filed, especially a certificate nominating persons who are already candidates of another party which is in opposition to the general ticket on which they desire to be placed, must be adopted merely because it was first filed, would violate the spirit of the election law. (Matter of Quimby, 116 App. Div. 142, affirmed on the ground that the question of fact had been decided by the lower courts; Matter of Independent Nominations, 186 N. Y. 266; Matter of Folks, 134 App. Div. 376, affirmed 196 N. Y. 540; Matter of Commissioner of Elections, 64 Misc. 620.) When there is no contest between different certificates, however, and the court is not called upon to pass upon conflicting claims of candidates nominated by two sets of nominators, the courts have held that they are powerless to interfere, unless some reason is made to appear why the name and emblem should not be used, or that some other body or party has a prior right to the use thereof. (Matter of Wechsler, 134 App. Div. 378.) In a very recent case, where there was but a single certificate of nomination, the court of appeals held that the fact that the signers of a certificate of nomination selected the same name and emblem as that of an independent body created a *presumption* that they must be members of that body and that evidence that all the regularly constituted authorities of the independent body had decided that no such nomination should be made in that district did not rebut it. (Matter of O'Brien, 206 N. Y. 694, affirming 152 App. Div. 856.) This decision was decided by a bare majority in both courts. In the court of appeals, Cullen,

C. J., wrote a strong dissenting opinion in which Vann and Werner, JJ., concurred, expressing a number of cogent arguments against the existence of any such presumption.

TITLE 5.—OBJECTIONS

The law provides for objections to certificates of nomination. They must ordinarily be filed within three days after the filing of the certificate. Where objections are filed, notice must be given forthwith by mail to the committee, if any, appointed on the face of such certificate to fill vacancies, and also to each candidate placed in nomination by such certificate, and the question raised by the objection shall be heard and determined in the manner prescribed for deciding questions arising as to names or emblems (Sec. 134; *post,* p. 166). Objections are public records (Sec. 127). If no objections are filed within the statutory time, the candidates named in the certificate must be recognized. (Matter of Cowie, 11 Supp. 838, Ingraham, J.)

TITLE 6.—DECLINATIONS

Nominations Made at Primaries: In view of the fact that the object and purpose and the whole idea of nominations by direct primaries is that the people at primary elections shall vote directly for the candidates for nomination of their choice, it is obvious that primary elections would become a nullity in practice if candidates who successfully contest for nomination and are thereafter nominated at the primaries should be permitted to decline such nomination and thereby permit another individual, who has not been so nominated by the people, to be selected in some

other method in his place, usually by a deal engineered by party bosses. This practice was repeatedly indulged in in 1913 and it was destructive of the principle and practice of direct primaries. The present election law, therefore, prohibits the declination of a nomination made by a primary (Sec. 50), except in the case where a person, who was not *designated* for nomination, receives the nomination for public office at such primaries (Sec. 133). In order to afford each candidate the fullest opportunity to decline a designation, the law provides that, upon the filing of a designating petition, the secretary of state or board with whom it is filed must forthwith conspicuously post the same or a certified copy thereof and keep it posted until after primary day and forthwith mail a notice thereof to each person named as a candidate for nomination therein (Sec. 49, as amended by Laws of 1914, Chap. 244); that a person designated may notify the officer with whom his designation is filed, in a writing, signed and acknowledged by him, that he declines the designation, filing such declination within six days after the third Tuesday preceding the ensuing primary (Sec. 50, as amended by Laws of 1914, Chap. 244), and that, if the candidate so designated does not decline the designation within such time and he is thereafter nominated at the official primary election, his name shall be printed on the official ballot as the candidate of the party or body holding the primary and he shall not be permitted to decline such nomination (Sec. 50, as amended by Laws of 1914, Chap. 244).

The only case, therefore, where an individual nominated at a primary may decline such nomination, is the single case where he was not designated at the primary and was nominated by the writing in of his

name in the blank space on the ballot provided for that purpose. In that case, if he wishes to decline the nomination he must do so not later than the seventh day after the date of the primary at which he was nominated by filing his written declination thereof, signed by him and duly acknowledged (Sec. 133, as amended by Laws of 1913, Chap. 820).

Nominations Not Made at Direct Primaries: In case a person is nominated for public office otherwise than by an official primary election, he may decline the nomination by filing a notice to that effect signed by him and duly acknowledged. Such declination must be filed at least twenty days before election, in case it is to be filed with the secretary of state, and at least eighteen days before election, if it is to be filed with a board of elections, and at least ten days before election, if it is to be filed with a town or village clerk, except that a declination to a town office in towns where town meetings are held at the time of the general election must be filed in the office of the board of election within eighteen days before election. Where a person declines within the stated time, his name shall *not* be printed on the official ballot (Sec. 133, as amended by Laws of 1913, Chap. 820).

TITLE 7.—VACANCIES IN NOMINATIONS

Primary Nominations: The vacancy in a nomination made at a primary election may be caused by the declination of the nominee in the single case that he was not originally designated (*ante,* p. 61), or by the disqualification or death of the candidate. Any such vacancy may be filled by a majority vote of a quorum of the state committee, if the vacancy occur in a nom-

ination for an office to be filled by all of the voters of the state, and otherwise by the members of the county committee or committees elected at such primary in the political subdivision in which such vacancy occurs, or by such other committee as the rules and regulations of the party may provide. Certificates of such nomination shall be filed in the office in which a designation of a candidate for such office is required to be filed (Sec. 90, as amended by Laws of 1913, Chap 820).

Other Party Nominations: If a nomination made otherwise than by an official primary election is duly declined, or the attempt to nominate at a primary results in a tie, or a candidate regularly nominated otherwise than by an official primary election dies before election day or is found to be disqualified to hold the office for which he is nominated, or if any certificate of nomination is found to be defective but not wholly void, the power to fill the vacancy is vested in a committee appointed on the face of the certificate (Secs. 123, 135). Two out of three members of the committee may act (Sec. 136; Kirk *v.* Gallagher, 146 App. Div. 685). The committee files a new certificate (Sec. 136), but retains the same name and emblem (Sec. 135). There are certain time limits, except in case of the death of a candidate after printing of the official ballots, when the vacancy may still be filled by filing the proper certificate of nomination; but in that case the custodian of primary records must prepare and furnish to the inspectors, and the ballot clerks must affix in the proper place and in a proper manner upon each official ballot before delivery to a voter, a paster bearing the new candidate's name (Secs. 136–137).

Party Nominations Occurring too Late for Nomination by Primary: A primary nomination of a candidate for a vacancy required to be filled at the next general election but occurring too late to be made at the appropriate primary may be filled by a majority vote of a quorum of the state committee, if the vacancy occur in a nomination for an office to be filled by all the voters of the state, and otherwise by the members of the county committee or committees elected in the political subdivision in which such vacancy occurs at the official primary preceding the general election at which such vacancy is to be filled or by such other committee as the rules and regulations of the party may provide (Sec. 91, as amended by the Laws of 1913, Chap. 820).

Independent Nominations: Vacancies in independent nominations are filled by a committee to fill vacancies named in the certificate (Sec. 123).

TITLE 8.—RECORD OF NOMINATIONS, OBJECTIONS AND DECLINATIONS

All filed certificates and corrected certificates of nomination, all objections to such certificates and all declinations of nomination are public records. It is the duty of every officer or board to exhibit, without delay, every such paper to any person who shall request to see the same.

It is also the duty of such officer or board to keep a book, which shall be open to public inspection, correctly recording the names of candidates, the titles of the offices, the names and emblems of the independent bodies making the nomination, and in which shall also be stated all declinations and objections and the time of filing each of the said papers (Sec. 127).

Title 9.—Printing the Ballot

Authority Vested in Boards of Election: The secretary of state, fourteen days before election, certifies to the various boards of elections the candidates nominated by certificates filed with him or to whom he has issued certificates (Sec. 129) and the various boards provide the official ballots (Sec. 341). The sole guide to the boards of elections in preparing the ballot must be the certificate of the secretary of state, the certificates of nomination filed with it and its records showing the nomination of party candidates at primaries. (Sec. 89, subdiv. 4; Matter of Madden, 148 N. Y. 136; People *ex rel.* Hirsh *v.* Wood, 148 N. Y. 142.)

No Nomination: When the party column ballot was in use it was held that, if a party entitled to a column on the ballot makes no nomination, the board need not print the column at all. (Matter of Myers, 140 App. Div. 22.) And, under the new law, if a party entitled to nominate a candidate for any office makes no nomination for such office there is no statutory requirement that the board insert a space and the words "no nomination." Under the Myers decision, it would seem, therefore, that it need not print a space for such vacancy.

Presidential Ballots: If two parties name the same candidate for elector, his name will appear in the same position in each ticket (Sec. 331). This would be required even in the absence of a statutory provision. (Vass *v.* Britt, 209 N. Y. 557.)

Errors: An honest mistake or some slight omission in printing the ballots does not invalidate an election. (People *ex rel.* Hirsh *v.* Wood, *supra;* People *ex rel.* Williams *v.* Board of Canvassers, 183 N. Y. 538, affirming 105 App. Div. 197, on opinion of Chester, J., below; Matter of Merow, 112 App. Div. 562; Matter

of Hirsh, 14 Misc. 377; People *ex rel.* Hayes *v.* Edwards, 42 Misc. 567; Matter of Holtzman, 87 Misc. 116.) The use of lighter paper than that prescribed does not render the ballots cast void. (People *ex rel.* Abrams *v.* Voorhis, 45 Misc. 104.) If ballots are printed, however, so that votes thereon are no longer secret, such votes are void. (People *ex rel.* Nichols *v.* Board of Canvassers, 129 N. Y. 395.)

TITLE 10.—FAILURE OF ELECTION OFFICIALS TO ACT

Until the recent decision of People *ex rel.* Deitz *v.* Hogan (214 N. Y. 216), the law was regarded as settled that, where the constitution or a statute requires an election to fill a vacancy to be held on the day of a general election and the election officials fail to provide for such an election, either by neglecting to issue the requisite writ of election or to print the name of the office on the official ballot, any voter has the constitutional right to signify his choice for election to such office by writing on his ballot both the name of the office and his candidate therefor, and his ballot must be recognized and counted and the candidate receiving the majority of votes so cast be declared duly elected. In People *ex rel* Davies *v.* Cowles (13 N. Y. 350) it appeared that the constitution required an election to fill a vacancy in the office of justice of the supreme court to be held on the day of the next general election. The vacancy occurred too late to permit the secretary of state to issue a writ of election. A large number of voters, however, voted for candidates for justice and the court of appeals held that the election was valid and that the relator having received a majority of the votes had been duly elected. The next decision, chronologically, is People *ex rel.* Woods *v.* Crissey (91 N. Y. 616, 634–635). In that case, there was a vacancy existing since the prior election, and an individual persuaded fifty-five of his friends to vote for him. The court pointed out the

distinguishing feature between that case and the Davies case (p. 635), that in the Davies case "an authority stood behind the election and commanded it, and no less an authority than the constitution itself," whereas, in the Woods case (p. 634), the only method of filling the vacancy "was by an order of the Common Council directing an election to be held to fill it *and determining the time and place*," and the common council had not acted. In view of this complete absence of authority for an election, either in the constitution or statutes or by direction of the common council, the court declared that "there can be no election without some valid authority behind it" and held that the alleged "election" was obviously a nullity.

The next two decisions, chronologically, are Montgomery *v.* Odell (67 Hun, 169, affirmed, 142 N. Y. 665) and the leading case of People *ex rel.* Goring *v.* Wappingers Falls (144 N. Y. 616, affirming 83 Hun, 130). In the latter case, the officials charged with the duty of preparing the ballots omitted to print thereon the name of the office of police justice of Wappingers Falls. Notwithstanding the omission, forty-four persons voted for the relator for that office, their votes being all that were cast therefor. The court of appeals held that the relator was duly elected. At general term, Cullen, J., declared that in all cases where a vacancy occurs in any office which it is ordained shall be filled at a general election, any voters may vote for their candidate to office, even though the election officials have taken no action whatever. "How can the State deny the right of any qualified voter to vote at the time *prescribed?*" In the court of appeals, Gray, J., writing for an unanimous court, said: "If the clerk, or other officer charged with the duty, neglect to print upon the official ballot the name of an office, which, under the law, was to be filled at the elec-

tion for which the official ballots were prepared, *the qualified voter will not thereby be deprived of his constitutional right to vote for any person he chooses for such an office* . . . In contemplation of law, the official ballot prepared for the voter is deemed to contain the names of all the offices to be filled at the election and if, by omission, clerical or otherwise, an office is not named upon it, *the voter is warranted in writing in . . . the name of the office and the person whom he desires to vote for as the incumbent therefor.*"

In People *ex rel.* Deitz *v.* Hogan, *supra*, it appeared there were two vacancies in the board of aldermen; that a provision of the New York city charter, permitting the appointment of aldermen to a vacancy for a full unexpired term was unconstitutional; and that a number of voters wrote the title to the office and the names Deitz and Brady, the relators, on their ballots. The court of appeals held that "while it is true that *there ought to have been an election to fill such vacancies*, and that the omission may leave the districts without representation in the Board of Aldermen for a year, nevertheless it would be upholding a fiction to treat the occurrences upon which the relators rely as an election for the offices which they claim . . . Here there was no more an election for aldermen than there was in People *ex rel.* Woods *v.* Crissey."

This decision of the court of appeals apparently disregards the "constitutional right" of the voters who voted for Deitz and Brady. (People *ex rel.* Goring *v.* Wappingers Falls.) It also overlooks the distinction expressly laid down in the Woods case between that case and such cases as the Davies, Goring and Deitz and Brady cases, that, in those cases "an authority stood behind the election and commanded it, and no less an authority than the constitution itself."

ARTICLE V

PARTY NOMINATIONS BY PRIMARY ELECTIONS

TITLE 1.—IN GENERAL

It has already been pointed out that, with the enactment of the direct primary law of 1913, state-wide direct primaries became an accomplished fact (*ante,* p. 38) and that virtuully every party nomination in the state must be made by an official primary election. each party holding its own primary (for exceptions see *ante,* pp. 54–55).

The election law defines the term "official primary" or "official primary election" to mean a primary election held by a party for the purpose of nominating party candidates for office or electing persons to party positions and conducted by the public officers charged by the law with the duty of conducting general elections. "Unofficial primary" or "unofficial primary election" is defined as any other primary or primary election held by a party or independent body (Sec. 3, Definition 2, as amended by Laws of 1913, Chap. 820).

TITLE 2.—DATE AND HOURS

Primary Day: The election law defines primary day to mean the day upon which an official primary election is held as provided in the election law (Sec. 3, Definition 3). In each year an official primary election must be held on the fifth Tuesday before the general election. This is the annual fall primary (Sec. 3, Definition 4). In presidential years, an additional official primary election must be held on the first Tuesday in April. This is the spring primary (Sec. 3, Definition 5; Sec. 70, subdiv. 5).

Hours: The primaries shall be held open from 3 P. M. to 9 P. M. (Sec. 70, subdiv. 3).

TITLE 3.—QUALIFICATION OF VOTERS

The right of a voter to participate in any official primary election is subject to challenge (Sec. 72). No person shall be entitled to vote at any official primary unless he is duly enrolled with the party holding the primary and may be qualified to vote on the day of election (Secs. 19, 71, 80). The inspectors shall decide all questions relating to the qualification of voters (Sec. 71), but, if any enrolled voter is challenged and makes oath or affirmation that he is the person whose name he has given as his name and for thirty days has resided and still resides at the address which he has given as his residence "he shall be allowed to vote" (Sec. 72). It has been suggested that this provision disqualifies a voter who moves within the thirty-day period in the same election district. Such, however, was not the intent of the legislature (Secs. 21, 23); and if it were, the provision would probably be unconstitutional (ante, pp. 7–8).

TITLE 4.—DESIGNATIONS

Definition: The term "designation" is defined as any method in accordance with the provisions of the election law by which candidates for party nominations or for election as party committeemen or delegates or alternates to a national party convention (*i. e.* to party position, Sec. 3, Definition 12) may be named in order that they be placed on the official ballot for any official primary election (Sec. 3, Definition 10).

Form and Character: The direct primary law of 1913 abolished committee designations by certificate. All designations of candidates for party nomination or for election to party position must be made by petition only (Sec. 46, as amended by Laws of 1913, Chap. 820).

The form of a designating petition is set forth in the election law (Sec. 48). All voters desiring to make a designation should adhere strictly to that form. A faulty designation cannot be corrected by an order of the supreme court allowing an amended petition to be filed. (Matter of King, 155 App. Div. 720.)

Grouping Candidates: A petition for the designation of candidates for party nomination or for election to party position may designate candidates for nomination for one or more public offices or for election to one or more party positions, or both.

Signers: All persons signing a designation must be enrolled voters of the party, resident within the political subdivision or unit of representation for which the nomination or election is to be made (Sec. 48; Matter of Murphy, 126 App. Div. 58; Koenig *v.* Britt, 149 App. Div. 68, affirmed 204 N. Y. 681).

The maximum number of signatures required in any case is 3 per cent. of the total number of enrolled voters of the party residing in such subdivision as determined by the last preceding enrollment.

In nearly every case, however, this maximum of 3 per cent. is further reduced as follows:

Any office to be filled by all the voters:	Maximum signatures necessary, but, in no case, over 3 %:	
Of the State	3,000	
Of a city containing more than 1,000,000 inhabitants	1,500	
Of any other city of the first class	1,000	
Of any city of the second class	500	
Of any city of the third class	250	
Of any county or borough containing 250,000 inhabitants	1,000	
Of any county or borough containing from 2,500 to 250,000 inhabitants	500	
Of any congressional district	500	
Of any senatorial district	500	
Of any other county	250	
Of any assembly district	250	(Sec. 48).
For Justice of the Supreme Court, Judge of the Court of General Sessions in the City of New York, and Judge of the City Court of the City of New York	1,500	(Sec. 48, as amended by Laws of 1915, Ch. 678).

Signing for too Many Candidates: The law provides that a voter shall not join in designating a greater number of candidates than the number of persons to be elected. Where an enrolled voter signs a petition or petitions designating such greater number of candidates his signatures, if they bear the same date, shall not be counted, and if they bear different dates they shall be counted in the order of their priority of date and only so far as he was entitled to make designations (Sec. 48).

Filing: Designations must be filed not earlier than two days after the fifth Tuesday and not later than the third Tuesday preceding the primaries. They shall be filed with the officer with whom independent certificates of nomination are required to be filed.

Death of Designee Before Filing: If a designee dies before the petition is filed, it would seem that the signatures to the petition become a nullity as to him, that there is no vacancy and a new petition should be prepared for some one else, as in the case of independent nominations (People *ex rel.* Wall *v.* Britt, N. Y. Law Journal, October 16, 1913, Pendleton, J.)

TITLE 5.—OBJECTIONS

The new primary law provides for objections to designations. Prior to this amendment the law did not contain any provision authorizing the courts to go behind a designation, valid on its face, even upon proof of false acknowledgments (Matter of Salter, 76 Misc. 33). Under the present provision, objections must be filed within three days after the filing of the petition. Thereupon, notice must be given by mail to the committee appointed upon the face of the petition and also to each candidate desig-

nated by such petition and the questions raised by the objection are heard and determined in the manner prescribed in relation to conflict in name or emblems (Secs. 55-a, 125).

TITLE 6.— DECLINATION

Notice of Designees: Designations, on filing, become public records; they must be stamped with the date of filing; they, or certified copies thereof, must be conspicuously posted in the office where they are filed and remain so posted until primary day; and they must be open to inspection as public records at all reasonable hours (Sec. 49). The board or officer with whom the petition is filed must mail a notice thereof to each person designated for nomination for office (as distinguished from election to party position— Sec. 49).

Declination: Any designee may decline his designation by notifying the officer with whom the designation is filed in a writing signed and duly acknowledged by him. The declination to be effective must be filed within six days after the third Tuesday before primary day (Sec. 50). A filed declination cannot be attacked by the designee on the ground that he delivered it to a third person on an express condition, and such person filed it in violation of such condition. Matter of Kaufman (N. Y. L. J., September 22, 1914, Philbin, J.)

Notice of Declination: The officer with whom a declination is filed must thereafter notify the committee authorized to fill vacancies in designations, and if the declination is filed with the secretary of state, he must also notify the boards of election for any election districts affected by such declination (Sec. 50).

Filling Vacancies: The vacancy created by a declination must be filled not later than the second Tuesday before primary day (Sec. 50).

Death Before Petition Filed: In case of the death of a designee before the petition is filed there is no "vacancy" (*ante* p. 72).

TITLE 7.— OFFICIAL PRIMARY BALLOT

Definition: The election law defines the term "official primary ballot" to mean the ballot prepared, printed and supplied for use at an official primary election (Sec. 3, definition 11).

History: There has been no detail of primary reform that has been regarded as more essential than an official primary ballot. Thus Governor Charles E. Hughes, in urging the legislature of 1908 to enact some decent primary legislation, said: "Provision should also be made for additional protection against the commission of frauds at primary elections. With respect to this, provision for an official primary ballot is of the utmost importance. It is generally agreed that this will accomplish much in preventing fraud" (Message of May 11, 1908). Just as the legislation enacted between 1890 and 1895 marked a step forward in election reform and was regarded as a great reform because it provided for an official ballot for use at general elections, although the ballot so created was the iniquitous party column ballot that remained in use down to the enactment of the Massachusetts Ballot Act of 1913, so the Dix direct primary law of 1911 marked a step forward in primary reform in that it placed upon the statute books the first provision for an official ballot for use at primary elections. The ballot so adopted, however, conferred every conceivable

preference on the machine, even giving it a preferential column and the right to use the party emblem as against other members of the party itself. The Direct Primary Law of December, 1913, provided for a new ballot which fulfills the highest ideal suggested by election reformers *up to date*. So far as New York state is concerned this ballot is the newest of the new, but the civic organizations which have been advocating the adoption of such a ballot assure the public that the ballot is so beautifully simple that even the most inexperienced voter will be able to make his choice without difficulty.

The New Official Primary Ballot: Each party has its own official primary ballot. This is necessarily so, because each party holds its own primary election. The ballots of no two parties can be of the same color. The secretary of state designates the color for each party.

To the voter who has in mind the former party column ballot, the chief characteristics of which were the party column and the use of emblems, the first thing which he must realize now in forming an idea of the new ballot is that it has *no columns* and *no emblems*.

In view of the fact that the voter will be ordinarily called upon to vote for two different classes of candidates, to wit, candidates for nomination for public office and candidates for election to party position, the face of the ballot is divided into two parts by a vertical line. The lefthand space is reserved for candidates for nomination; the righthand space for candidates for party position. Considering, first, the lefthand space, the different offices to be filled appear in the same consecutive order in which they appear at a general election and the candidates for each office will be grouped under the title of the office. The order in which the

names of the candidates will appear in each particular group will be determined by lot. Considering, now, the righthand space, the election law prescribes the order of the various party positions and also provides for a similar grouping as in the case of nominations, except that there is a provision that where two or more candidates are to be elected to a party position, the names of the candidates designated by each petition shall be grouped and a single cross mark will vote for all.

The names of candidates for nomination and for party position are numbered consecutively, with a large numeral at the left of the name of each candidate from one upward, beginning with the name of the first candidate for nomination whose name is printed first upon the ballot and continuing consecutively through the names of said candidates for nomination and then consecutively through the names of the candidates for party position, except that where there are two or more candidates for party position grouped together such group shall have but one number which shall be printed opposite the approximate center of the group. The law contains a provision that the name of a candidate shall be placed upon a ballot only once unless he is a candidate for both public office and party position (Sec. 58, as amended by Laws of 1913, Chap. 820).

The Ballots at General and Primary Elections: By comparing the provisions as to the official primary ballot and the official ballot at general elections, it will be seen that both abolish the party column and adopt in place thereof the Massachusetts form which groups candidates for a single office in a single block or section. The two ballots in minor details differ in two respects. The primary ballot, being the ballot of a single

party, bears no emblems, whereas the ballot at general elections, being a ballot for use among various parties and independent bodies, provides for emblems. Similarly, on the official primary ballot the order of candidates is determined by lot. On the official ballot at elections, precedence is given to the respective candidates of the party which polled the highest number of votes for governor at the last preceding election for governor (Sec. 331, subd. 3).

Union Label: A primary ballot is not void because it bears a union label. (Matter of Peters, 60 Misc. 420.)

Unofficial Ballots: If, for any cause, the official ballots for any party shall not be provided as required by law at any polling place, upon the opening of the polls of any primary election thereat, or if the supply of official ballots for any party shall be exhausted before the polls are closed, unofficial ballots, printed or written, made as nearly as practicable in the form of the official ballot, may be used (Sec. 81).

TITLE 8.—PRIMARY DISTRICTS; OFFICERS; CONDUCT OF PRIMARY ELECTIONS; CANVASSES

Primary Districts: In villages having less than 5,000 inhabitants and in the city of New York, each election district constitutes a primary district. In cities and villages of 5,000 or more inhabitants, except the city of New York, the various boards of election determine the primary districts, and each district consists of *two* election districts, except where there is an odd number and, then, the highest numbered district constitutes a primary district by itself. Each of these primary districts contains two polling places, one for the party which at the last gubernatorial election cast the highest number of votes for governor and the other for all other parties (Sec. 74, as amended by Laws of 1915, Chap. 678).

Officers: Election officials for each election district within a primary district comprise the election officers for such primary district (Sec. 70, subd. 1). In a city, town or village in which each election district constitutes a primary district, the election officers for that district constitute the primary election officers. In a city or village having more than 5,000 inhabitants, except the city of New York, there is a board of primary election officers for each polling place. In each district, one group consists of the election inspectors, poll clerks and ballot clerks for the election district or districts which shall at the time represent the party which at the last gubernatorial election shall have cast the largest number of votes for governor and the other consists of the officers who shall represent the party which at such election shall have cast the second largest number of votes for governor. The first mentioned officers conduct the primary election of the party represented by them and the second group of officers the primary elections of all other parties (Sec. 74, as amended by Laws of 1915, Chap. 678).

Primary election officers must take and subscribe the constitutional oath of office, before entering on the discharge of their duties (Sec. 70, subdiv. 2) and perform the same duties that they are required to perform at a general election, and such additional duties as are prescribed for primaries (Sec. 70, subdiv. 4).

Poll Clerks: Special provision is made for primary poll clerks (Sec. 78).

Removal: Removals from primary boards are made, and vacancies filled, in the manner provided for removals on a day of registration (Sec. 77, *post*, p. 148).

Notice: The election law provides that a notice of official primaries be issued by the appropriate boards of election (Sec. 75).

Paraphernalia: The paraphernalia of primaries are substantially the same as at general elections (Sec. 79).

Manner of Voting: The provisions as to the folding and delivery of ballots and the manner of voting are substantially the same as those prescribed by the provisions of law relating to general elections (Sec. 80). An amendment enacted in 1915 provides that in New York city, the voter must sign the poll book before voting (Sec. 78-a, added by Laws of 1915, Chap. 678). The voter, on retiring to the voting booth, makes a cross mark in the voting square at the left of the name of each candidate for whom he desires to vote. A cross mark is defined as any straight line crossing another straight line at any angle within the voting space, and no ballot shall be declared void because a cross mark therein is irregular in character (Secs. 82, 86, *post,* p. 122). The voter must not make any mark on the ballot other than a cross mark for the purpose of voting. He shall make his mark with a pencil having black lead, and only in the voting space to the left of the name of a candidate, except that he may write in the appropriate blank space the name of any person or persons for whom he desires to vote whose name or names are *not* printed upon the ballot. The voter must not deface or tear the ballot in any manner nor make any erasure or inclose in the folded ballot any other paper or any article (Secs. 82, 86). If the voter marks more names than there are persons to be nominated for an office or elected to a party position or if for any other reason it is impossible to determine the voter's choice his vote shall not be counted therefor, but shall be returned as a blank vote for such nomination or party position (Sec. 86).

If a voter defaces a ballot, he may obtain one additional ballot (Sec. 82).

Canvass of Votes: As soon as the polls close the inspectors shall publicly canvass and ascertain the result thereof. They must not adjourn or postpone the canvass until it is fully completed. They determine questions by a majority vote. The room must be clearly lighted, the canvass made in the plain view of the public and the main entrance to the room must remain unclosed. The canvass must be carried out in substantially the same manner as the canvass of votes at a general election (Sec. 85, *post*, p. 107).

Proclamation and Statement of Result: Immediately upon the completion of the canvass, the board must make public oral proclamation of the result thereof and also a written statement of such result upon the statement of result sheet, which it files with the custodian of primary records, and also a duplicate thereof, which it files with the clerk of the city, town or village (Sec. 87).

Disposition of Ballots: Ballots rejected as void or protested as marked for identification must be inclosed in a separate sealed package and filed with the original statement of the canvass (Sec. 85). Other ballots are replaced in the ballot boxes, which, after being securely locked and sealed, are returned to the officer from whom they were received, who must keep the same safely for not less than thirty days and until all suits or proceedings touching the same shall have been finally determined. Other official records must be preserved at least two years (Sec. 88).

Persons Within the Guard-Rail: The only persons to be admitted within the guard-rail are election officers, including the superintendent of elections and deputies (Sec. 479), watchers, persons admitted by

the inspectors to preserve order or enforce the law, persons duly admitted for the purpose of voting and, at the canvass, candidates (Sec. 83).

Electioneering: Electioneering within any polling place or within one hundred feet therefrom is prohibited, and no political banner, poster or placard shall be allowed in or upon a polling place on any primary day (Sec. 84).

Canvass of Statement of Result: Each board of elections must canvass the statements of results filed with it and must complete its canvass within one hundred and twenty hours from midnight of the day upon which the primary election was held. It acts ministerially. It has no power to take evidence or otherwise act than to canvass the statements. (People *ex rel.* Calihan *v.* Hunt, 75 App. Div. 33; Matter of Thomas E. Rush, 42 Misc. 70, Clarke, J.)

A candidate in a district wholly within the jurisdiction of a board of elections who has received the highest number of votes cast in such district shall receive the nomination. If he be elected to a party position, the board of elections must deliver to him, upon request, a certificate of such election. The board of elections must certify to the secretary of state a statement of the vote cast in its territory for all candidates whose designations are required to be filed in the office of the secretary of state (Sec. 89, subdiv. 1, as amended by Laws of 1914, Chap. 244). The secretary of state shall then proceed to canvass the certified statements filed with him. The candidate who has the highest number of votes shall receive the nomination or be elected to the party position. The secretary of state, there-

after, shall transmit to each candidate elected to a party position a certificate of such election (Sec. 89, subdiv. 2). The statement of result filed or prepared in the office of a board of election or of the secretary of state showing the nomination of a party candidate for public office at an official primary election is equivalent to a certificate of his nomination and no other nomination shall be required to be filed for any such candidate so nominated (Sec. 89, subdiv. 4).

The law also provides for so-called unofficial primaries (Sec. 92).

ARTICLE VI

INDEPENDENT NOMINATIONS

TITLE 1.— IN GENERAL

Distinctions: At the beginning of the discussion of the system of elections in New York, it was pointed out that the distinction between parties and independent bodies is one to be constantly kept in mind in considering the election law (*ante,* p. 39). This is particularly true at this point. Chronologically, each faction of every party has now made its designation. Each party has held its primary and the official canvasses have resulted, in due course, in the nomination of party candidates for all the parties. In short, the party nominating machinery has fully completed its work and the duly nominated candidates of the various parties are commencing their campaign for election. All nominations, however, have not yet been made, for there still remain such additional nominations as may be made independently of party machinery. These are

the so-called "independent nominations," which will now be considered.

Definitions: "Independent bodies" make "independent nominations" of "independent candidates" or "nominees." The term "independent body" means any organization or association of citizens, which, by independent certificate, nominates candidates for office and which, if it nominated a candidate to be voted for at the preceding general election of a governor, did not poll at least ten thousand votes for its candidate for such office (Sec. 3, definition 14).

Construction: In construing the laws relating to independent nominations, the most liberal construction should be placed thereon in favor of the independent voter. (Matter of Adams, 21 Misc. 396, Herrick, J.; Matter of Bulger, 48 Misc. 584.) Thus, such laws will be construed to cover all offices, whether expressly mentioned or not. (Matter of Fagan, 21 Misc. 403, Gaynor, J.)

Privileges: An independent body of voters, who entertain the same political views, is entitled to the same emblem for all its nominees. (Matter of Wise, 108 App. Div. 52; see also *ante,* p. 58.)

TITLE 2.—METHOD OF NOMINATING

Independent Certificate: Independent bodies nominate by certificate (Sec. 123).

Name: Each certificate must designate, in not more than five words, the name of the independent body making the nomination, which must not include the name of any organized political party (Sec. 123).

Place: The place of filing certificates of nominations depends on the office to be filled. Sometimes

they are filed with the secretary of state, more often with the appropriate board of elections and, in some cases, with the clerk of a city, village or town. All filed certificates are public records, and the officer or board must also keep a public book recording all certificates, objections and declinations filed with him or it (Sec. 127).

Death of Candidate Before Filing: If a nominee dies before the independent certificate is filed, the signatures to the petition become a nullity as to the office for which he is nominated. There is no "vacancy" and a new certificate must be prepared for someone else for such office. In other words, the nomination was arrested by death in the making and before completion. (People *ex rel.* Wall *v.* Britt, N. Y. Law Journal, October 16, 1913, Pendleton, J.)

Time: The time of filing independent certificates of nomination depends both on the class of nomination and on the office to be filled or place of filing, as follows:

> If filed with the secretary of state, must be filed between twenty-five and forty-two days before election;
>
> If filed with village clerks and with town clerks where town meetings are to be held at a time other than the time of the general election — between ten and twenty days before election.
>
> All others — between twenty and forty-two days before election.
>
> In case of a special election, not less than ten days before such election (Sec. 128).

These requirements as to time are mandatory, but the courts may grant relief, in the absence of negligence or fault, from accident or mistake. (Matter of

Darling, 189 N. Y. 570, overruling Matter of Cuddeback, 3 App. Div. 103. See also People *ex rel.* Simmons *v.* Ham, 56 Misc. 112; Matter of Bayne, 69 Misc. 579; distinguished, Matter of Swarthout, 76 Misc. 24.)

Last Day a Sunday: Where the last day to file party certificates of nominations with the secretary of state falls on a Sunday, a strict construction of the statute would require such certificates to be filed on the preceding Saturday, and the attorney-general has so ruled. (Carmody, A.-G., A.-G. Rep. of 1911, p. 647.) Where, however, the secretary of state has fixed Monday on the election calendar he is required to make, certificates must be accepted on that day. (Matter of Bayne, *supra.*)

Hour: A certificate may be delivered to the proper officer, wherever he is, up to midnight of the last day. (Matter of Norton, 34 App. Div. 79, appeal dismissed, 158 N. Y. 130; Carmody, A.-G., 2 Opinions of 1911, p. 647.)

Preliminary Determination: It has been held at special term that the officer to whom an independent certificate of nomination is offered may determine, in the first instance, the sufficiency of the certificate. (People *ex rel.* Wall *v.* Britt, N. Y. Law Journal, October 16, 1913, Pendleton, J.) In the case cited, the court was undoubtedly correct in its decision that the certificate in question was a nullity, because the only candidate nominated thereby had died before the petition was to be filed, but the precise decision of the court was to deny a motion to compel the board to *receive* the certificate. It is possible that a court should not compel a board to receive a void certificate, but the board is a ministerial body and public policy requires that it accept every certificate offered to it, so that any question in respect thereto may be heard

in the supreme court on objections; and if the decision should be construed to mean that a board has the right to exercise judicial powers and refuse to receive certificates because it determines them to be insufficient, the decision cannot be sustained. In other words, in the case cited, it would seem that the better practice would have been for the board to have accepted the certificate and to have had the question of its validity reviewed in the supreme court upon objections.

TITLE 3.—QUALIFICATIONS OF SIGNATORIES

An independent body may nominate a candidate who has been nominated by one or more of the parties or one who has not been nominated by any party. A signer of an independent certificate must be a duly qualified elector of the district for which the nomination is made and must be or become registered, that is, he must be a registered voter (Sec. 123), but it does not matter whether he registers before or after signing the certificate. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231; People *ex rel.* Steinert *v.* Britt, 146 App. Div. 683. Compare Matter of Horan, 108 App. Div. 269.)

Limitations as to Signers: An enrolled member of a party may sign an independent certificate. He may bolt all or one of his party's nominees, but he is prohibited from signing a mere "indorsing petition" *for his own party's candidates* (Sec. 123). Prior to the enactment of chapter 649 of the Laws of 1911, a grave abuse had become widespread at elections of having tickets and candidates repeated over and over on the ballot, causing a reduplication of identical columns with identical tickets. Campaign managers, seeking

the advantage of what had the appearance of an independent indorsement of their candidates, persuaded enrolled members of their own party to sign pretended "independent" certificates, nominating "independently" the identical candidates whom their party had already placed in nomination, thus securing for their ticket or candidates the right to run under an independent name and an independent emblem, in a separate additional column of the ballot (Matter of Brevillier, 116 App. Div. 144, affirmed 186 N. Y. 266), although, as a matter of fact, there was not even a scintilla of "independence" about the nominations. They were of party candidates named by party men. The additional columns were "mushroom columns" and nothing else. They served no useful purpose whatever. The amendment of 1911 effectually cured this abuse, by providing that, in case a candidate nominated by an independent certificate of nomination be, at the time of filing the certificate, or afterwards, the candidate of a political party for the same office, the name of no person who is an enrolled member of *such* political party shall be counted upon such independent certificate of nomination (Sec. 123). This provision, in the first place, recognized "the sacred right of a party man to bolt," thereby rendering ineffective a dangerous decision to the contrary (Matter of Commissioner of Elections, 64 Misc. 620, Andrews, J.); and, secondly, it prohibited party men from signing indorsing petitions for their own party candidates. It was exactly what was needed to strike "mushroom columns" from the ballot. Its effect, according to the court of appeals, was "to prevent a wrongful use of independent nominations." (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231.)

TITLE 4.—NUMBER OF SIGNATORIES

The courts have repeatedly pointed out that, in view of the great difference in population among the various counties, a requirement that specified numbers of signatures be obtained for each office regardless of the number of voters in the county or other district cannot be just to all, and a percentage of the number of voters in each county or district would result more satisfactorily and justly; and the court of appeals in 1912 held some of the numbers specified under statutes running back more than a decade to be prohibitive and therefore unconstitutional, and, in effect, specified new numbers in the place thereof. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231, as supplemented and modified by People *ex rel.* Woodruff *v.* Britt, 206 N. Y. 246; Matter of Cohoes, 78 Misc. 87, Chester, J.) The legislature of 1913 complied with this mandate of the court of appeals by passing, over Governor Sulzer's veto, a law providing that independent nominations of candidates for offices to be voted for by the voters of any political subdivision of the state can only be made by *five per centum* of the total number of votes cast for governor at the last gubernatorial election in such political subdivision. The law retained the provision that nominations for offices to be voted for by all the voters of the state can only be made by six thousand or more voters (including fifty from each county) and also provided that not more than three thousand voters shall be required to make an independent nomination in *any* political subdivision and not more than one thousand five hundred for a borough or county office (Sec. 122, as amended by Laws of 1913, Chap. 800).

TITLE 5.—THE CERTIFICATE AND ITS EXECUTION

An independent certificate of nomination may be made for the nomination of more than one candidate, if the signers are qualified to make a certificate as to all the candidates. (Matter of Independent Nominations, 186 N. Y. 266, 278, reversing Matter of Bennet, 116 App. Div. 138.) A certificate must contain the title of the offices to be filled and the name and residence of each candidate nominated. It may designate a committee to fill vacancies. Each signer, after signing, adds his place of residence and makes oath that he has truly stated his residence and that it is his intention to support at the polls the candidacy of the person or persons nominated in the certificate (Sec. 123).

Forgery, Fraud and Irregularity: Even though a certificate apparently contains forgeries and irregularities, they do not affect it unless it appears, with sufficient clearness, that they reduce the legal number of nominators below the requisite number. (Matter of Walker, 134 App. Div. 947.) Reduplications are forgeries, but unregistered signatures are not. (Matters of Baillee and Archibald, 78 Misc. 84, 86, Chester, J.) If a certificate consists of more than one sheet, no separate sheet can be received if five per centum of the names thereon are fraudulent or forged (Sec. 123). This may be avoided by placing all the signatures on one sheet or each signature on a sheet by itself. The provision is aimed at procuring honesty in the preparation and filing of these certificates. Its validity has been upheld by the courts. (Burke *v.* Terry, 203 N. Y. 293; Matter of Baillee, *supra.*)

For the purpose of ascertaining whether a person whose name appears on a certificate did not *sign* the same, his affidavit or testimony that he did not do so

is *prima facie* evidence of that fact (Sec. 123). The courts in New York county have refused to accept a signer's evidence, by affidavit or otherwise, that he did not *verify* his petition. (*In re* Wendel, not reported, October 23, 1913, Newburger, J.). If the name of a person who has signed a certificate appears upon another certificate nominating the same or a different person for the same office, it cannot be counted upon either certificate (Sec. 123).

ARTICLE VII

REGISTRATION

TITLE 1.—DEFINITIONS AND DISTINCTIONS

The term "registration" is not expressly defined in the election law, but it means the method by which a voter places his name on an official record or register of the persons qualified to vote in the election district in which he resides at the next general election. Registration has nothing to do with parties or independent bodies, nor with enrollment, nominations or voting on election day. Its function is merely to provide, in advance of elections, an authentic list of qualified voters for each election district, thereby tending to prevent illegal voting. The ideal registration law would be one which afforded the fullest opportunity to qualified voters to get their names on the register, coupled with complete precaution against fraudulent voting. Registration is now necessary at all general elections, as is indicated by the oft-repeated warning in the public press at registration time "If you do not register,

you cannot vote." It is not required for town and village elections not held at the same time as a general election (Sec. 161).

The constitution divides the state into two divisions and provides that, in cities and villages having five thousand inhabitants or more, voters shall be registered upon personal application only; but voters not residing in such cities and villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters. (Constitution, Article 2, Sec. 4.) It thus makes a sharp distinction between populous districts and rural communities, requiring personal registration in the former and prohibiting its requirement in the latter on the first day of registration.

TITLE 2.—REGISTRATION IN RURAL COMMUNITIES

The language of the constitutional provisions prohibiting a requirement of personal registration on the first day of registration is so curiously worded that, while registration laws for populous districts have become more rigid each year, no adequate law to protect rural communities against fraudulent registration has ever been enacted. The legislature of 1911 attempted to enact a law making a more rigid rule for rural communities, but this was held unconstitutional; and the court of appeals, in declaring that law unconstitutional, laid down the first clear guide to the legislature as to its powers under the constitutional provision. The court held that the legislature might require "proper proofs" and, within the limits of reason, the nature of the proof is under its control. It

might require application by letter, or through an agent, or proof by affidavit or the testimony of a third person; but it could not authorize or require the inspectors to refuse to register an applicant if he should not appear personally on the first day. (Fraser *v.* Brown, 203 N. Y. 136.)

In 1913, the legislature, having this decision in mind, again attempted to make a law on the subject and provided that at the first meeting for registration the inspectors must place upon the register the names (1) of all persons who voted at the last preceding general election, (2) those presenting themselves in person, except the names of such electors as are proven to the satisfaction of such inspectors to have ceased to be electors in such district, and (3) those proven to the satisfaction of such inspectors to be then or thereafter entitled to vote, by their affidavits and those of two qualified electors (Sec. 159). The Court of Appeals, however, held that the 1913 statute was also unconstitutional, because of what it considered the arbitrary selection of the persons to make the two supporting affidavits; and it sustained the statute to the extent, and to the extent only, that it requires the inspectors at the first meeting to place on the register the names of those specified in (1) and (2), *supra,* and also of (3) those proven to the satisfaction of such inspectors to be then and thereafter entitled to vote at the election for which such registration is made, which proof, the court held, may be made "by affidavit *or otherwise.*" (Rupert *v.* Rees, 212 N. Y. 514.)

In all election districts other than in cities or villages having 5,000 inhabitants or more, there are two days of registration, the fourth and third Saturdays before election, from 7 A. M. to 9 P. M. (Sec. 150). Upon the second day the inspectors must place upon the register the names only of such persons as may then

appear in person (Sec. 159, as amended by Laws of 1913, Chap. 820).

Whenever any election district in a village having 5,000 inhabitants or more embraces territory without the limits of the village, inspectors must treat such territory without the limits of the village the same as any other rural community wholly outside of a city or a village having 5,000 inhabitants or more (Sec. 158).

Imperfect Registration: Since the voters of the year before are entitled to registration without further act on their part, the fact that the inspectors omit a voter's residence does not preclude him from voting. (Matter of Mathews, 143 App. Div. 561.)

TITLE 3.—REGISTRATION IN NEW YORK CITY

An amendment enacted in 1915 provides that, in New York City, there shall be six days of registration, beginning on the Monday four weeks before election and continuing on each day of the week. The hours are 5:30 P. M. to 10:30 P. M., except on Saturdays, when they are 7 A. M. to 10:30 P. M. (Sec. 150, subdiv. 2, as amended by Laws of 1915, Chap. 678).

TITLE 4.—REGISTRATION GENERALLY

In cities and villages having 5,000 inhabitants or more, the names of such persons only as personally appear before the inspectors and who are or will be at the election for which the registration is made qualified electors shall be registered for a general election (Sec. 158). The only exception to this rule is the case where an election district in a village having 5,000 or more inhabitants embraces within its boundaries territory without the limits of such village (*supra*, p. 93).

Registration Days: In every city, except New York City, and in villages having 5,000 inhabitants or more, there are four registration days — the fourth and

third Fridays and Saturdays before a general election. The hours for registration are from 7 A. M. to 10 P. M. (Sec. 150).

TITLE 5.—QUALIFICATION AND DISQUALIFICATION OF VOTERS

The election law repeats, in substance, the constitutional qualifications (Sec. 162) and disqualifications (Sec. 175) of voters, and the constitutional provisions against gaining or losing a residence by sojourn in the service of the United States, and elsewhere (Sec. 163). These provisions have already been discussed (*ante*, p. 7).

Convicts: The law provides in addition, that conviction of a felony is a disqualification, unless the person is pardoned and restored to citizenship (Sec. 175), but this provision does not apply where the person has been sentenced or committed to a house of refuge or other reformatory (Penal Law, Sec. 644), nor where sentence has been suspended. (People *v.* Fabian, 192 N. Y. 443). The attorney-general has ruled that it applies to a conviction in the federal courts. (Carmody, A.-G., A.-G. Rep. of 1912, p. 339.)

Removal: The law provides that, if a voter, after registering, moves within the same election district, he may have the register corrected and vote on election day (Sec. 165). He does not become disqualified by the subsequent demolition of the building which is his place of residence before election day. (People *ex rel.* Perry *v.* Hagan, 25 Misc. 125.) If, however, he moves out of the election district between registration day and election day, he necessarily loses his vote.

Naturalized Persons: The inspectors may require of naturalized citizens the production of their naturalization papers, or a certified copy thereof, and to make oath of identity, but if a naturalized citizen, for any reason, cannot produce such papers, he may furnish

other evidence which will satisfy the board of his right to be registered (Sec. 174); and if the board refuses to place his name upon the register, he may compel it to do so by mandamus. The inspectors act ministerially in these matters, as in all others. (People *ex rel.* Noel *v.* Smith, 10 Misc. 100.)

TITLE 6.—THE REGISTER

The inspectors make a quadruplicate register, each inspector making a copy (Sec. 154). Outside of New York City the pages of the register are arranged in twenty-four columns, to contain each voter's name, residence, age, place of birth, length of residence and other information, and the twenty-second column contains the words "the foregoing statements are true" and is reserved for the signature of voters who register personally (Sec. 155, subd. 1). In New York City the register is arranged in twenty-nine columns, the twenty-fourth and twenty-fifth columns relating to enrollment (Sec. 155, subdiv. 2, added by Laws of 1915, Chap. 678). All four registers must be certified by all the inspectors (Sec. 176). The register made by the chairman is and is known as the public copy of registration and must be left in a prominent position in the place of registration from the first day of registration until election day and at all reasonable times must be open to public inspection and for making copies thereof (Sec. 177). The other three copies are variously disposed of (Secs. 177–8). After election, the public copy and the two copies used by the inspectors go to the board of elections (Sec. 180).

TITLE 7.—CONDUCT OF REGISTRATION

Procedure: In considering the conduct of registration, the voter is concerned only with those cases where he is required or voluntarily elects to register in person, because in other cases the inspectors place his name on the register if he voted the preceding year

or is proven to their satisfaction to be entitled to vote at the next election.

Where the voter registers in person, the process of registration consists in his appearing before the board, answering a number of questions relating to his qualifications, and signing his name, by his own hand, under the words "The foregoing statements are true." That is all there is to it.

Inability to Sign Register: If a voter alleges his inability to sign, he is further examined from a list of questions known as "identification statements for registration day" and, after he has answered them, the inspector certifies that he read such questions to the voter and truly recorded the latter's answers (Sec. 155).

Illiterate and Disabled Voters: If a voter is required to register personally and declares that he is unable to write by reason of illiteracy, or that he will be unable to prepare his ballot without assistance by reason of blindness, loss of both hands, inability of both hands for ordinary purposes, or that he will be unable to enter the voting booth without assistance by reason of diseased or crippled condition, the nature of which he must specify, the board must administer an oath to him to the effect that he will be unable to prepare his ballot without assistance because of his condition (Sec. 164).

Challenges: Any person who applies personally for registration may be challenged by any qualified voter or watcher who is present. If an applicant be so challenged, or if any inspector has reason to suspect that he is not entitled to have his name registered, the chairman or any inspector must administer to him an oath to make true answer to certain questions and then an inspector must read to him a list of questions specified in the law and contained in a so-called "challenge affidavit" (Sec. 168) and enter the answers on the affidavit, and the applicant subscribes his name

thereto. If the applicant, by his answer, satisfies a majority of the board of his right to be registered, they must register his name as an elector; if not, they shall point out to him the qualifications which he lacks and his name shall not be registered, except upon an application to the court. If the applicant refuses to make oath or to answer any questions, he thereby becomes disqualified (Sec. 169). The inspectors must deliver all challenge affidavits to the police or sheriff for investigation (Sec. 170) and keep copies for their own use on election day (Sec. 171).

In New York City, the chairman must challenge the registration of any person applying for registration under a name on the superintendent's challenge list, unless it affirmatively appear, after strict examination of the voter and, if necessary others also, that the voter has become "domiciled" at a new address in the election district (Sec. 486, subdiv. 1, as amended by Laws of 1915, Chap. 678).

Entry Requiring Challenge on Election Day: Any voter may make oath to the board that he has reason to believe that any person on the register will not be qualified to vote and the board must place the words "to be challenged" opposite such person's name and, when such person offers his vote at such election, must administer to him the general oath as to qualifications. If he refuses to take such oath he cannot vote (Sec. 173).

ARTICLE VIII

GENERAL AND SPECIAL ELECTIONS

TITLE 1.—TIME AND PLACE

General Election: The general election is the election which must be held annually on the Tuesday next succeeding the first Monday in November (U. S. Revised Statutes, Sec. 131; N. Y. Constitution, Article 3, Sec. 9, Article 12, Sec. 3; Election Law, Sec. 3, definition 1, 290).

Executive Writ: The election law provides for a notice of election to be issued by the secretary of state under his hand and official seal (Sec. 293). This is an executive writ.

Special Election: The governor, in his discretion, is authorized to proclaim a special election to fill an elective office in certain cases and under certain restrictions (Sec. 292).

Election Day: Election day is a holiday (General Construction Law, Sec. 24). No parade or drill of the active militia may be ordered for that day (Military Law, Sec. 111). While the polls are open, no person may sell, expose for sale, or give away any liquor within a quarter of a mile of a polling place (Liquor Tax Law, Sec. 30). No toll shall be charged or collected from any person going to or from the polls (Transportation Corporations Law, Sec. 130). Service of legal process may apparently be made, as it may on Christmas Day (Didsbury *v.* Van Tassel, 56 Hun, 423), Lincoln's Birthday (Matter of Bornemann, 6 App. Div. 524) and Labor Day (Flynn *v.* Union Surety Co., 170 N. Y. 145).

Hours: The polls of every general election must be opened at 6 A. M. and close at 5 P. M. There shall be no adjournment or intermission until the polls are closed (Sec. 291). Under a former statute it was held that, at 5 P. M., the delivery of ballots to voters must cease, and no voter to whom a ballot had not been delivered before 5 P. M. could be allowed to vote (Newcomb *v.* Leary, 128 App. Div. 329), even though standing on a line of waiting voters within the polling place or even within the guard-rail. Since that decision, however, the law has been amended and, under the present statute, all voters "who are *in the polling place at or before 5 o'clock in the afternoon shall be allowed to vote*" (Sec. 291, as amended by Laws of 1913, Chap. 820). This statute has been liberally construed and all qualified voters on line at a polling

place, whether inside *or outside* of such polling place at 5 o'clock, are entitled to vote (Opinion of Corporation Counsel Polk, October 9, 1914).

Place: The town board of each town and the common council of each city, except New York and Buffalo, and the board of elections of each of the latter cities, must designate annually the place in each election district at which the meeting for the registration of voters and the election shall be held (Sec. 299) and cause lists of the places so selected, with their boundaries, to be published in newspapers supporting the candidates nominated that year by the two parties, respectively, polling the highest and next highest number of votes in the state at the last preceding election for governor (Sec. 301). The selection of newspapers used to be based on advocacy of the principles of such parties (People *ex rel.* Quinn *v.* Voorhis, 187 N. Y. 327), but this was changed in 1913 to support of the candidates nominated (Laws of 1913, Chap. 587).

TITLE 2.—VACANCIES IN PUBLIC OFFICE

A vacancy occurring before October 15th of any year in any office authorized to be filled at a general election must be filled at the general election held next thereafter, unless otherwise provided by the constitution or unless previously filled at a special election (Sec. 292). The reference to the constitution refers to vacancies in the office of governor and lieutenant-governor, as to which there is devolution of title (Constitution, Article 4, Secs. 6, 7). It has also been said to refer to offices not made elective by the constitution which may be filled by appointment for the balance of the unexpired term or by election at some other election, as may be provided (*ante,* p. 25; Public Officers Law, Sec. 38; People *ex rel.* Ward *v.* Scheu, 167 N. Y. 292). A vacancy in the office of justice of the supreme court is not authorized to be filled at an election unless the vacancy occurs not less than three months before such election (Constitution, Article 6, Sec. 4).

TITLE 3.— PARAPHERNALIA

Booths, Ballot Boxes, Guard-Rail, etc.: Each polling place must contain a sufficient number of voting booths of specified dimensions, at least one for every seventy-five registered voters. Each booth must be fitted with a swinging door, a shelf and supplies and conveniences, including pencils having black lead only, and must be kept clearly lighted while the polls are open, by artificial lights, if necessary. Each polling place must contain a guard-rail provided with a place for entrance and exit (Sec. 317).

There must be separate ballot boxes as occasion shall require to receive (1) ballots for presidential electors, (2) ballots for general officers, (3) ballots for constitutional amendments and questions submitted, (4) ballots for town propositions and upon town appropriations, (5) ballots defective in printing or spoiled and mutilated, and (6) stubs detached from ballots (Sec. 316).

Blank Forms: There shall also be printed blank forms upon which the election officers shall make written returns showing the performance of their duties. These blanks include three blanks (1) for a return by the ballot clerks, (2) tally sheets for tallying the votes as canvassed, and (3) blanks for a return by the inspectors of the votes as tallied. The forms vary in the case of an election to vote for presidential electors, general officers and upon questions submitted (Secs. 334–9).

American flag: The American flag must be displayed in each polling place (Sec. 300a, added by Laws of 1913, Chap. 783).

Tally Sheet: The tally sheet is the original entry of the canvass of the votes and is the most important of

the records and governs in case of any discrepancy between it and the original statement or the return kept by the inspectors. (Matter of Stewart, 155 N. Y. 545; Matter of Hearst, 183 N. Y. 274; Matter of Stiles, 69 App. Div. 589.)

TITLE 4.— CONDUCT OF ELECTIONS AND METHOD OF VOTING

Election Officers: The election officers for each election district, consisting of four inspectors of election, two poll clerks and two ballot clerks (*post,* p. 146), are required to meet at the polling place at least one-half hour before the time set for opening the polls — that is, by 5.30 A. M. (Sec. 350). In case there is a vacancy, it must be filled (*post,* p. 148).

Oaths: Each election officer must take and subscribe the constitutional and statutory oath of office within five days after notice of his appointment (Sec. 307). In addition, he must make oath, before the opening of the polls for election, that he " will not in any manner request, or seek to persuade, or induce any voter to vote any particular ticket or for any particular candidate, and that he will not keep or make any memorandum or entry of anything occurring within the booth, and that he will not, directly or indirectly, reveal to any person the name of any candidate voted for by any voter, or which ticket he has voted, or anything occurring within the voting booth, except he be called upon to testify in a judicial proceeding for a violation of the election law " (Sec. 357).

Organization of Board: Before otherwise entering upon their duties, the inspectors of each district must immediately appoint one of their number chairman, or if a majority do not agree upon such appointment, they

must draw lots for that position (Sec. 314). The inspectors also designate, or choose by lot, one of their number to receive the ballots from the voters (Sec. 353), and choose by lot another inspector to compare the signatures of voters made in the registration book on registration day with their signatures made in the poll book to be signed by them on election day. The chairman also designates one of the poll clerks to keep such poll book and a poll clerk to keep the book containing identification statements for election day (Sec. 355).

Opening the Polls: The election officers must arrange the space within the guard-rail and the furniture, including the voting booths, for the orderly and legal conduct of the election. The inspectors are responsible for having then and there the register of voters, the various ballot boxes, ballots and other paraphernalia of elections; and they must open the sealed packages, post the instruction cards, deliver the ballots to the ballot clerks, and the poll books to the poll clerks, cause the distance markers to be placed one hundred feet away from the polling place, be sure that the voting booths are supplied with pencils having black lead only, unlock the ballot boxes, see that they are empty and relock them (Sec. 350). One of the inspectors shall then make proclamation that the polls are open and of the time in the afternoon when they will be closed (Sec. 350). The following proclamation may be used:

> "Hear ye! Hear ye! Hear ye! The polls of this election are opened, and all persons attending the same are strictly charged and commanded, by the authority and in the name of the people of this state, to keep the peace thereof during their

attendance at this election on pain of imprisonment. And all persons are desired to take notice that the polls will be closed at five o'clock in the afternoon." (Instructions for election officers, as published under direction of the secretary of state.)

Conditions During Polling Hours: After the boxes are relocked, they shall not be unlocked or opened until the closing of the polls (Sec. 350). There shall be no electioneering within the polling place or within one hundred feet therefrom (Sec. 352). No person shall be admitted within the guard-rail, except the superintendent of election, deputy superintendents (Sec. 479), inspectors, poll clerks, ballot clerks, watchers, persons admitted by inspectors to preserve order or enforce the law, persons admitted for the purpose of voting and, during the canvass, candidates (Sec. 351). The proceedings of the board are public. The inspectors may neither close the polls nor retire therefrom to deliberate (Secs. 291, 315). Each inspector has full authority to preserve peace and good order and enforce obedience to his lawful commands and may order the arrest of any person violating the election law, other than an election officer (Sec. 315).

Procedure in Voting: In order to vote, the voter enters within the guard-rail and forthwith proceeds to the inspectors and gives his name and residence. One of the inspectors, thereupon, announces his name and residence in a loud and distinct tone of voice (Sec. 356). The inspectors other than the inspector designated to receive ballots ascertain whether he is duly registered and, if he is, announce that he is so registered (Sec. 353). If he is not registered, he cannot vote (Sec. 356). Each poll clerk enters the voter's

number, name and residence in his poll book, and the voter signs his name in the poll book kept for the purpose below the words, "The foregoing statements are true." The inspector previously designated for the purpose compares the voter's signature in the poll book with his signature in the registration book and if the signature is the same or sufficiently similar as to identify it as having been written by the same person, the inspector certifies that fact by writing his initials after such signature. If the voter, on registration day, alleged his inability to so sign, then a poll clerk reads to him the same list of questions as were required to be read on registration day from a book of "identification statements for election day" and writes the answers thereto. If the signatures or answers do not correspond, any watcher or challenger may and, if they do not, the inspectors must challenge the voter (Sec. 355). If the voter is entitled to vote and is not challenged, or, if challenged and the challenge be decided in his favor, an inspector or ballot clerk delivers to him one official ballot or set of ballots duly folded (Sec. 356). The voter's receipt of the ballot is the commencement of the act of voting. If, thereafter, the voter leaves the space within the guard-rail, before voting, he cannot enter again within the guard-rail for the purpose of voting or receive any further ballots (Sec. 359). On receiving his ballot, the voter forthwith and without leaving the enclosed space retires alone, unless he be one entitled to assistance (*post,* p. 106), to one of the voting booths, and, without undue delay, unfolds and marks his ballot. If all the booths are in use and voters are waiting, he can occupy his booth only five minutes (Sec. 358). The voter, having marked his ballot, leaves the voting booth with

his ballot folded so as to conceal the face of the ballot, but to show the indorsement on the back; and, keeping the same so folded, proceeds at once to the inspector in charge of the ballot box and offers the same to such inspector. This inspector announces the voter's name and the printed number on the stub in a loud and distinct tone of voice (Sec. 359). The poll clerks report whether the number on the poll books and the number of the ballot or ballots delivered to the voter is the same as the number on the stub (Sec. 355). Then, if such voter be entitled then and there to vote and be not challenged, or if challenged and the challenge be decided in his favor, and if his ballot or ballots are properly folded and have no mark or tear visible on the outside thereof, and if the printed number on the stub is the same as that entered on the poll books as the number on the stub, such inspector shall receive such ballot or ballots and, after removing the stub or stubs therefrom in plain view of the voter and without removing any other part of the ballot or in any way exposing any part of the face thereof below the stub, deposit each ballot in the proper ballot box for the reception of voted ballots (Sec. 359) and the stubs in the box for detached ballot stubs (Secs. 353, 359). As each voter votes, the inspectors check his name upon the register and enter therein the number on the stub of the ballot or set of ballots voted by him (Sec. 353). Upon voting, the voter passes outside the guard-rail, unless he be one of the persons authorized to remain within the guard-rail for other purposes than voting (Sec. 359). Upon the close of the polls, the poll clerks and inspectors compare the poll book with the registers and correct any mistakes (Sec. 355).

Illiterate or Disabled Voters: Any voter who, at registration, has made oath to physical disability or illiteracy (*ante,* p. 96) or who, being registered, makes oath that he has become so disabled since registration, or who, not being required to register in person, makes oath to physical disability or illiteracy, may choose two election officers of different faith to assist him in preparing his ballot. At any town meeting or village election, where the election officers are all of the same political faith, any voter entitled to assistance may select one of such election officers and one voter of such town or village of opposite political faith from the election officer to render such assistance (Sec. 357).

Employees: Employers must allow their employees two hours in which to vote (Sec. 365).

TITLE 5.—CHALLENGES

Time: The right of any person to vote whose name is on the register is subject to challenge (Sec. 356). He may be challenged either when he applies to the ballot clerk for his ballots or when he offers his ballots to the inspector or previously, by notice to that effect to an inspector, by any elector (Sec. 361).

Who May Challenge: Any inspector must challenge every person offering to vote whom he knows or suspects not to be duly qualified as an elector and every person challenged at registration, provided such challenge has not meanwhile been withdrawn. Any watcher or challenger may also challenge any voter (Sec. 361). In New York City, the chairman must challenge the vote of any person presenting himself to vote under a name on the superintendent's challenge list (Sec. 486, subdiv. 2, as amended by Laws of 1915, Chap. 678).

Procedure on Challenge: The ordinary course of procedure on a challenge is the administering of the so-called "preliminary oath," followed by a prescribed examination (Sec. 362). Where a person applies to

vote on the name of a person challenged at registration, the preliminary oath is administered and the questions on the challenge affidavit asked again. This gives an opportunity for comparing the two sets of answers and descriptions. If there is any material difference or conflict between the answers or in the descriptions, the law provides that the applicant's vote "shall not be received" (Sec. 361). A voter having the qualifications prescribed in the constitution has a constitutional franchise of which he cannot be deprived by the officers who administer the law (*ante,* p. 10). In all cases, therefore, if the applicant persists in his claim to vote and the challenge is not withdrawn, the so-called "general oath" is administered and, in a proper case, particular oaths relating to the cause of challenge; *and if the voter takes all the oaths tendered to him, his vote "shall be accepted"* (Sec. 363; People *ex rel.* Smith *v.* Pease, 30 Barb. 588), even if some one else has already voted on his name. (People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670.) A voter cannot even be deprived of his right to vote by arrest. He must be afforded the privilege of voting before he is removed from the polling place. (Sec. 315; People *ex rel.* Borgia *v.* Doe, *supra;* People *v.* Hochstim, 76 App. Div. 25.) Of course, in any case where an applicant refuses to comply with the statutory tests, either by refusing to take any oath or answer any question, he loses his right to vote (Secs. 361–3).

TITLE 6.—ORIGINAL CANVASS BY ELECTION OFFICERS

In General: As soon as the polls are closed, the inspectors must publicly canvass and ascertain the votes and not adjourn or postpone the canvass until it shall be fully completed. The room in which such canvass

is made shall be clearly lighted and such canvass shall be made in plain view of the public. It shall not be lawful for any person or persons, during the canvass, to close the main entrance to the room in which such canvass is conducted in such manner as to prevent ingress and egress.

At the close of the polls, before the ballot boxes are opened, the ballot clerks must make up a triplicate return accounting for all the official ballots furnished to the election district in which they are serving, and sign and swear to their returns and deliver the same to the chairman of the board of inspectors. At the same time, the poll clerks assist the inspectors in comparing the poll books with the register and shall make out and sign and swear to their triplicate returns and deliver the same to the chairman. The ballot boxes shall then, and not before, be opened (Sec. 366).

Order of Canvassing: After these returns have been executed and filed, the boxes are opened and the ballots canvassed in the following order — first, the box, if any, containing the presidential ballots, second, the box, if any, containing general ballots and third, the box, if any, containing ballots upon constitutional amendments or other questions submitted, including town questions (Sec. 366).

Comparing Number of Ballots: The inspectors commence the canvass by comparing the two poll books with the register, correcting any mistakes therein and by counting the ballots found in the ballot boxes, without unfolding them, and by comparing the number of ballots found in each box and the number shown in the poll books and on the ballot clerk's returns to have been deposited therein. If the ballots found in any box are more than the number of ballots shown to have been deposited therein, all of the ballots shall be replaced,

without being unfolded, shall be thoroughly mingled, and an inspector, designated by the board, shall, without seeing the same and with his back to the box, publicly draw out as many ballots as equal such excess, and without unfolding them inclose them in an envelope which he shall seal and indorse " excess ballots from the box for," designating the name of the particular box, and shall then place the envelope in the box for defective or spoiled ballots. If two or more ballots are found in a ballot box folded together, and if the whole number in the box exceeds the number shown by the returns to have been deposited therein, they or enough of them to reduce the ballots to the proper number shall similarly be inclosed, sealed and indorsed and placed with the spoiled ballots. If there lawfully be more than one ballot box for the reception of ballots voted at the polling place, no ballots found in the wrong ballot boxes shall for any reason be rejected, but shall be placed in their proper box by the inspectors upon the count of the ballots before the canvass and counted in the same manner as if they where found in the proper ballot box, provided such ballots shall not make the total of ballots more than is shown to have been deposited.

No ballot that has not the official indorsement shall be counted, except such as are voted in accordance with the provision of law relating to unofficial ballots (Sec. 367).

Method of Canvass: The chairman unfolds each ballot of the kind being canvassed face downward and places all the ballots, so unfolded, face down, in one pile. He then takes up each ballot in order and announces the vote registered on the first section and he then turns it face down and places it in a new pile. When the canvass

of the first section of all the ballots of a kind have been canvassed in this manner and the poll clerks' tallies are proved to be correct, the official return is filled out and signed. Then, and not before, the chairman proceeds to canvass in like manner the votes upon the other sections remaining to be canvassed, completing the canvass *of each ballot* as he proceeds. In other words, in view of the importance to the public of ascertaining the vote for the head of the ticket, the first section is always canvassed first and then the ballots are gone through only once more, the remaining sections on each ballot being canvassed together. When all sections have been canvassed, the number of the ballots is compared with the tally. If in the result as shown by the number of the ballots an error has been committed a recanvass must be made. Upon the recanvass, the tally must be kept in red ink. When all the errors have been corrected and the tally sheets have been found to be correct, they are folded and closed and the inspectors and poll clerks must sign the certificate at the foot of each sheet at the places indicated thereon (Sec. 368, as amended by Laws of 1914, Chap. 244).

Canvassing Presidential Ballots: In view of the fact that presidential ballots retain the party column, a slightly different method of canvassing is required. The straight ballots and the split ballots are placed in separate piles, the pile of straight ballots is counted and the number of straight votes for each candidate entered in gross opposite his name on the tally sheets. The numbers of split, void and blank ballots are similarly entered. The chairman shall then take up the split ballots and canvass them and they shall be tallied in the manner already indicated (Sec. 368).

Objections to Counting: If objection to the counting

of any ballot or section be made the board shall forthwith rule upon the objection. If the objection is continued after this ruling, the chairman shall write in ink upon the back of the ballot a memorandum of the ruling and objection, stating how the ballot was counted (Sec. 369).

Disposal of Ballots: When all the ballots of any one kind have been canvassed, the chairman places all the ballots of that kind as to the counting of which objection was taken, all wholly void ballots and all wholly blank ballots in a separate sealed package. The other ballots shall be tied together, labeled and returned to the ballot box from which they were taken before proceeding to canvass the next kind of ballots to be canvassed (Sec. 369).

Proving the Tallies: The law contains a provision for proving the tallies. Election officers should be careful to comply with this provision (Sec. 370).

Inspection: Ballots at all times must be kept on top of the table and in plain view until they have been tied into bundles. If requested by any person entitled to be present the inspectors must exhibit to him the ballot being canvassed, but no inspector should allow any ballot to be taken from his hands (Sec. 371).

Returns of Canvassers: Upon completing the canvass the inspectors and poll clerks must make and sign in ink their several returns in triplicate. Each of the two tally sheets shall be securely attached by the chairman to one of the returns relating to the same office or question and shall be treated as part thereof.

Powers of Inspectors: Inspectors cannot determine qualifications. The duty of the inspectors to canvass the votes after rejecting the ballots declared void, like all their other duties (*ante*, p. 10), is ministerial and they cannot determine any question of a candidate's

eligibility. (Matter of Atkinson, 28 Misc. 694, affirmed 45 App. Div. 628.)

Proclamation of Result: Upon the completion of the canvass and the making of the original statement and copies thereof, the chairman must make a public oral proclamation of the whole number of votes cast at the polling place for all candidates for each office, upon each proposed constitutional amendment or other question or proposition, if any, voted upon at such election, the whole number of votes given for each person, with the title of the office for which he was named on the ballot; and the whole number of votes given respectively for and against each proposed constitutional amendment or other question or proposition, if any, so submitted (Sec. 375). Such proclamation should be made in the form following:

"Hear ye! hear ye! hear ye! The whole number of votes given for the office of (governor) found in the box just canvassed was 389, of which number there were given for said office, for Levi P. Morton (243), for David B. Hill (120), for Francis E. Baldwin (26)," (naming each person voted for, for the office of governor, and the number of votes given for him for that office).

"The whole number of votes given for the office of lieutenant-governor, found in the same box, was .....; of which there were given for that office, for Charles T. Saxton ....., for Daniel N. Lockwood ....." Proceed on with the votes given for the different candidates. (Instructions for election officers, as published under direction of the secretary of state.)

Police Statements: In all cities and villages of five thousand inhabitants or more, the chairman thereupon delivers to the police officer on duty at the place of canvass a statement subscribed by the board, stating the number of votes received by each candidate for office. Such statement shall forthwith be conveyed by the said officer to the stationhouse of the police precinct in which such place of canvass is located, and he shall deliver the same inviolate to the officer in command thereof, who shall immediately transmit by telegraph, telephone or messenger, the contents of such statement to the officer commanding the police department of such city or village. Such statement must be preserved for six months by the police, and is presumptive evidence of the result of such canvass for each office (Sec. 372).

Police Statements in New York City; 1915 Amendment: An amendment enacted in 1915 provides that in New York City the commanding officer must cause all the returns to be tabulated "immediately," so that the final results may be known "as early as possible" (Sec. 372, as amended by Laws of 1915, Chap. 678). It may fairly be asked if the Republican legislature, in devising this amendment, was solicitous of assisting New York City voters to satisfy their curiosity on election night, or whether it deemed that up-state captains could use the police returns for New York City as a basis for calculating the votes needed up-state to offset the vote in New York City.

Sealing Statements: The statements of canvass must be securely sealed in separate envelopes and kept inviolate by the officers or board with whom they are filed, until delivered, together with the sealed packages of void and protested ballots, to the appropriate board of canvassers (Sec. 376).

Disposition of Statements, etc.: In New York City, the chairman of the board files the original statement of

canvass, the sealed package of void and protested ballots and a poll book and tally sheet with the county clerk; and an inspector, designated by the chairman, files a certified copy of the statement and the other poll book and tally sheet with the board of elections (Sec. 378). Elsewhere, the chairman files the poll book, containing the signatures of voters, with the superintendent of elections, the original statement and package of void and protested ballots and a tally sheet with the board of elections, a certified copy of the statement, the other poll book and the other tally sheet with the town or city clerk, and delivers the other certified copy of the statement to the supervisor, or, if there is none, or he is absent, to an assessor (Sec. 377). The procedure is somewhat different in Erie County (Sec. 380).

Void and Protested Ballots: Each ballot declared void shall be indorsed upon the back with the specific reason for such rejection. The void and protested ballots are secured in a separate sealed package and filed by the chairman with the original statement of the canvass (Sec. 376). They may be destroyed at the end of six months from the time of completing the canvass, unless otherwise ordered by a court of competent jurisdiction (Sec. 437).

Preservation of Ballots in Boxes: The ballots voted, except the void and protested ballots, must be replaced in the box from which they were taken, together with a statement as to the number of such ballots so replaced. Each such box shall be securely locked and sealed, and shall be deposited with the officer or board furnishing such boxes. They shall be preserved inviolate for six months after such election, and may be opened and their contents examined upon the order of any court of competent jurisdiction and at the expiration of such time the ballots *must* be destroyed (Sec. 374, as amended by Laws of 1913, Chap. 821).

TITLE 7.—IRREGULARITIES AT ELECTIONS

De Facto Officers: An election is not invalidated although held by officers who were such *de facto* merely. (People *v.* Cook, 8 N. Y. 67.)

Irregular Ballots: It is not invalidated by honest mistakes or slight omissions in printing the ballot (*ante,* p. 65).

Carelessness of Election Officers: It is not invalidated by reason of the carelessness of the election officers. (People *ex rel.* Williams *v.* Board of Canvassers, 183 N. Y. 538, affirming 105 App. Div. 197, on opinion of Chester, J., below; Matter of Norton, 152 App. Div. 628.)

TITLE 8.—CANVASS BY COUNTY, CITY AND STATE BOARDS

On election night, the public gets the results of election from rapid calculations made from the police returns, it being obviously impossible for any official board to collate all the figures on the statements of result for each election district in a short period of time. This figuring, however, must be done before the newly elected officers can receive their certificates of election, and the process consists in "canvasses" made by county, city and state officials, organized as boards of canvassers, for the special service of so canvassing the votes. (Hankins *v.* Mayor, 64 N. Y. 18.) While the provisions of the law as to these official canvasses are complex and unsystematic, the scheme itself is simple and the canvass little more than successive tabulations of results until the addition of figures as to each candidate authorizes a determination as to who is elected. The official canvass is invariably made, in the first instance, by county boards, who meet on the Tuesday next after election. Each county board consists of the supervisors of the county, except in counties in New York City, where

it consists of the members of the board of aldermen elected within the county (Sec. 430). County boards make their respective canvasses from the original statements of canvass made in the various election districts (Sec. 431). Their work is purely ministerial. (People *v.* Cook, 8 N. Y. 67; People *ex rel.* Noyes *v.* Board of Canvassers, 126 N. Y. 392; People *ex rel.* Sherwood *v.* Rice, 129 N. Y. 391; People *ex rel.* Derby *v.* Rice, 129 N. Y. 461.) They have not even the power to determine that John Evans is Dr. John J. Evans, nor can the courts compel them to do so by mandamus. (People *ex rel.* Calihan *v.* Hunt, 75 App. Div. 33; People *ex rel.* Kathan *v.* Board of Canvassers, 75 App. Div. 110; Kortz *v.* Board of Canvassers, 12 Abb. N. C. 84.) They have the power to summon the inspectors to make corrections where it clearly appears that certain matters are omitted from any statement or that any merely clerical error exists therein, but the inspectors cannot change or alter any decision made by them, but can only cause their canvass to be correctly stated (Sec. 432). Thus, where the ballots correctly stated the name of David A. Munro, Jr., but the name is variously spelled and designated in the inspectors' statements, the inspectors can be compelled to make their statements correct. (People *ex rel.* Munro *v.* Board of Canvassers, 129 N. Y. 469.)

Each county board, upon the completion of its canvass, makes various statements, separately stating the result as to various candidates, and containing the total results in its county for all candidates and questions submitted (Sec. 437). They must determine what persons have been elected to the office of assemblyman and to county offices and school commissions, and their determination completes the canvass as to those officers (Sec. 438).

In counties which contain one or more cities, except Buffalo, the county boards constitute the city board (Sec. 430) and it seems to follow that their determination is final as to such city officers.

The canvasses by the county boards leave a further canvass necessary for those officers who run for office in more than one county, and also for questions submitted. This further canvass and the determinations thereon are made by the board of elections in New York City, which sits as a board of canvassers for such city officers (Sec. 440), and by the state board of canvassers, which makes the final canvasses as to all other officers and as to questions submitted (Secs. 439, 441). Their duties are also purely ministerial. (Matter of Hines, 141 App. Div. 569.) The state board consists of the secretary of state, attorney-general, comptroller, state engineer and surveyor and treasurer (Sec. 441). Both the state board and the board of elections canvass the certified copies of the statements of the county board of canvassers (Secs. 440, 442).

The secretary of state delivers certificates of election based on certified copies of the determinations filed with him (Sec. 443).

ARTICLE IX

BALLOTS AT GENERAL ELECTION

TITLE 1.—THE OFFICIAL BALLOT

Printing: The custodian of primary records or board of elections prepares and prints the official ballots (*ante,* p. 65). It must have the same in its possession

and open to public inspection four days before the election for which they are prepared. It must have sample ballots ready five days before election and must supply them to voters who apply therefor (Sec. 342). No ballot without the official indorsement shall be allowed to be deposited in the box, except where unofficial ballots are authorized to be used (*post*, p. 121) and none but ballots provided in accordance with the provisions of the law shall be counted (Sec. 359. See, however, *ante*, p. 65).

Form: The official ballot, as the term is used, refers, in ordinary parlance, to the ballot for general officers which, under the Massachusetts Ballot Act of 1913, is now of the form known as the Massachusetts form. As a matter of fact, however, the election law provides for five kinds of official ballots, called, respectively, (1) ballots for presidential electors, (2) ballots for general officers, (3) ballots upon constitutional amendments and questions submitted, (4) ballots upon town propositions, and (5) ballots upon town appropriations, which are to be used for the purposes which their names severally indicate and not otherwise. The ballots for general officers contain the names of all candidates, except presidential electors. Each political organization whose party name contains more than eleven letters selects an abbreviated form therefor containing not more than eleven letters which shall be used upon the ballot whenever the necessity of space so requires. The abbreviation shall be certified at the same time and in the same manner as party names are required to be certified. In printing the names of candidates whose full names contain more than sixteen letters, not more than one name, other than the surname, shall be printed in full and each candidate may indicate, in writing, to those charged with

the duty of preparing the ballots, the form in which, subject to this restriction, his name shall be printed (Sec. 331).

Ballots for Presidential Electors: The names of the presidential electors of each party shall be printed in one column containing, first, the electors at large, and, second, the elector of each district. The columns shall be parallel and there shall also be a blank column in which voters may write the names of candidates not on the ballot. At the head of each party column is printed the party emblem, below this a blank circle, below this the party name, below this the names of the candidates for president and vice-president and below this a heavy line followed by the column containing the names of the electors. Each party circle shall be surrounded by the instructions "for a straight ticket mark within this circle." In arranging the columns precedence shall be given to the several parties according to the number of votes for governor polled at the last gubernatorial election (Sec. 331).

Ballot for General Officers: In the case of ballots for general officers, the Massachusetts Ballot Act abolished the party column. The names of all candidates for any one office are printed in a separate section and the sections are in the customary order of offices. In arranging the names precedence of candidates is given to the candidate of the party which polled the highest number of votes for governor at the last preceding gubernatorial election, and so on. At the bottom of each section, as many separate spaces as there are candidates to be elected are left blank, so that the voter may write in the names of any candidates not on the ballot.

Excepting where a candidate for the office of governor only is nominated by more than one political

organization there is printed on each line below the top, from right to left, the party emblem, the voting square, the candidate's name and the name of his party.

In any case where a candidate for public office is nominated by more than one political organization, the party names and emblems of such organizations shall appear.

In case a candidate for the office of governor only is nominated by more than one political organization the voting squares are in the same column as the emblems and arranged horizontally thereunder, so that it may be determined what party secures the highest vote for governor (Sec. 331).

Form of Ballot for Questions Submitted: The reading form of each proposed constitutional amendment or other question submitted shall be printed in a separate section. At the left of each question shall appear two voting spaces, one above the other, one preceded by the word "Yes" and the other by the word "No" (Sec. 332).

TITLE 2.—SAMPLE BALLOTS

The board of elections must keep sample ballots on hand five days before election (Sec. 342). In addition to this, sample ballots of each kind equal in number to twenty-five per cent. of the number of official ballots must be provided for every polling place. They must be printed on paper of different color from any of the official ballots. One of each kind of sample ballots at any time on the day of election must be furnished upon application to any voter entitled to vote at that polling place and may be taken away by him from such polling place before receiving such official ballot or ballots (Sec. 333).

TITLE 3.—UNOFFICIAL BALLOTS

If the official ballots required to be furnished shall not be delivered at the time required, or if, after delivery, shall be lost, destroyed or stolen, the proper officials shall cause other ballots to be prepared, as nearly in the form of the official ballots as practicable, but without the indorsement, and, upon proper proofs, the inspectors of election shall cause these unofficial ballots to be used in the same manner, as near as may be, as the official ballots (Secs. 345, 360).

Defective official ballots are not unofficial ballots. (People *ex rel.* Nichols *v.* Board of Canvassers, 129 N. Y. 395.)

ARTICLE X

MARKING THE BALLOT

TITLE 1.—STATUTORY RULES

Although the Massachusetts Ballot Act provides for five different forms of ballot, including the Massachusetts form of ballot for general officers and the party column ballot for presidential electors, it struck from the election law the numerous and complicated rules which formerly bewildered the courts and the voters alike (Saxe, on Elections, Ed. 1, pp. 104–109), and substituted in place thereof the following simple statutory rules:

(1) To vote for an entire group of presidential electors of any party by means of a single mark, he shall make a cross mark in the circle above the party column.

(2) To vote for any candidate on any ballot, except for an entire group of presidential electors by means of a single mark, he shall make a cross mark in the voting square at the left of the candidate's name.

(3) If a voter makes a cross mark in the circle above a party column and also makes a cross mark in one or more voting squares at the left of the names of one or more presidential electors, or writes in a name or names, he shall be deemed to have voted for the electors whose names are thus specially indicated, and also for all the electors on the ticket so marked in the circle, except those whose names are opposite to the names so specially indicated.

(4) To vote for any candidate not on the ballot, he shall write the candidate's name on a line left blank in the appropriate place.

(5) To vote on any constitutional amendment or question submitted, he shall make a cross × mark in the appropriate voting square at the left of the question as printed on the ballot.

(6) If the voter marks more names than there are persons to be elected to an office or if for any other reason it is impossible to determine his choice of a candidate for any office, his vote shall be counted as blank for that office.

(7) Where a candidate for governor has been nominated by two parties and the voter marks in both squares, his vote for governor shall be counted, but he shall not be recorded as voting with any party (Sec. 358).

TITLE 2.— CROSS MARKS AND MARKS OTHER THAN A CROSS MARK

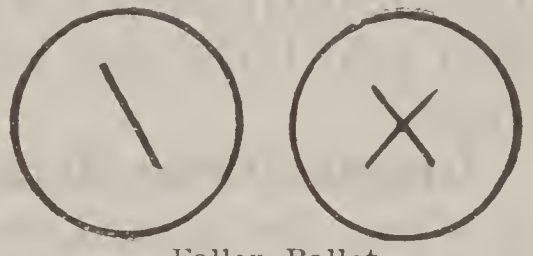
Statutory Provisions: A valid voting mark is now defined as "any straight line crossing any other straight line at an angle within a circle or voting

square." In addition to this, the statute provides that it is not lawful to make any mark other than the cross mark for the purpose of voting and that a void ballot is one upon which there shall be found any mark other than a cross mark made for the purpose of voting, but no ballot shall be declared void because a cross mark thereon is irregular in character (Secs. 10, 82, 86, 358).

Whether a ballot is so marked as to be void presents a question of law to be determined on the face of the ballot. (People *ex rel.* Feeny *v.* Board of Canvassers, 156 N. Y. 36; People *ex rel.* Krulish *v.* Fornes, 175 N. Y. 114; People *ex rel.* Courtney *v.* Unger, 85 App Div. 249.)

Fallon Ballot
No. 79
Fig. 1

DeGroot Ballot
No. 39
Fig. 2



Fallon Ballot
No. 112
Fig. 3

Distinctions: In the first place, it should be borne in mind that a mark in addition to a cross mark, whether made for the purpose of voting or otherwise, may be a part of the cross mark itself, making a three-line mark, irregular in character (Fig. 1), or it may be wholly disconnected with the cross mark (Fig. 2), possibly even appearing in a separate circle (Fig. 3). These two classes of additional marks must be considered separately, because, in one case, the question to be determined is whether the voter has made a valid voting mark, while, in the other, the question is whether cer-

tain additional lines appearing on the ballot make the ballot void, although the voting mark may be valid.

Additional Marks Disconnected With the Cross Mark: In Matter of Fallon (197 N. Y. 336), and Matter of De-Groot (197 N. Y. 589; 213 N. Y. 627), the court of appeals passed upon a number of ballots which bore marks in addition to and disconnected from the voting mark, and the court uniformly held such ballots to be valid. Examples of two of these valid marks are given in Figures 2 and 3. Similarly, Judge Lambert, in trying the recount of ballots upon the Hearst-McClellan recount, passed upon many ballots bearing long or short, dark or light lines, which he uniformly ruled to be accidental. (Judge Lambert's Rulings on the Markings of Ballots by John G. Saxe. See also People *ex rel.* Feeny *v.* Board of Canvassers, 156 N. Y. 36, Ballot 145.) The most recent decision is Matter of Garvin, Law Journal, June 9, 1915. There the appellate division held thirty-two ballots bearing extra dots to be valid.

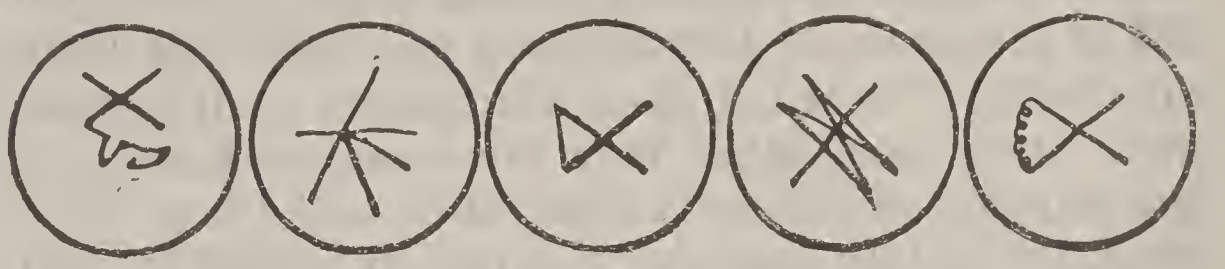
Irregular Cross Marks: Under the law as amended by Chap. 296 of the Laws of 1911 (Saxe law), any cross mark is a valid voting mark which contains any line crossing any other line. A three-line cross or a tit-tat-to mark is as valid as a simple two-line cross. This appears clearly from the law itself and from Matter of Garvin, *supra,* when the court disposed of twenty-one "irregular cross marks," as follows:

"They were all valid under the definition of the statute as it now exists . . . and the interpretation of voting marks given by the courts in the matter of Fallon, Matter of De Groot and Judge Lambert's rulings on the marking of ballots upon the Hearst-McClellan recount as published by John G. Saxe."

History of Cross Mark Law: The election law of 1896 (Laws of 1896, Chap. 909) defined a valid voting mark as "one straight line crossing another straight line" (Sec. 105), and that definition remained in the law, without change, until the enactment of the Saxe

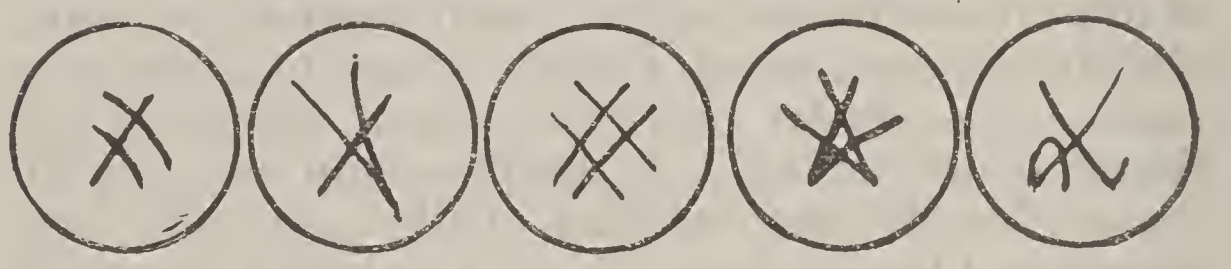
law. During the intervening period, however, the legislature made changes in the rules construing the intent of voters in making a voting mark. Thus, Chap. 335 of the Laws of 1898 added a rule including among void ballots "a ballot upon which there shall be found any voting mark other than the cross mark made for the purpose of voting" (Sec. 110); and Chap. 654 of the Laws of 1901 amended this rule by adding the word "single," so that the phrase read "a ballot upon which there shall be found any mark other than a *single* cross mark made for the purpose of voting." This latter amendment followed a decision of the court of appeals adopting a liberal construction of the former statute. (People *ex rel.* Feeny *v.* Board of Canvassers, *supra.*) In Matter of Fallon, *supra,* the court held that the construction of the statute, so far as it requires "one *straight* line crossing another straight line," should be liberal because "it is practically impossible for a person to make a line that is technically straight without the use of mechanical appliances" and, while making extremely liberal rulings on many voting marks, it held that the word "single," added by the legislature after the Feeny decision and the use of the word "one" in the phrase "*one* straight line crossing another straight line" required it to declare a number of crosses to be void. (See also Thacher *v.* Lent, 71 App. Div. 483.) The Saxe law of 1911 met the Fallon decision squarely, by striking from the statute both the word "single" and the word "one" and by providing, in addition, that no ballot should be declared void because a cross mark thereon was irregular in character. Under the provisions of the statute as thus amended, the constructive definition of a voting mark is more liberal than it has ever been, legalizing *any* line crossing *any other* line and not merely one line crossing another line. The destructive provision as to void ballots no longer contains the word "single" and, to settle all doubt, the saving clause provides that no ballot shall be declared void because a voting mark thereon is irregular in character (Secs. 10, 82, 86, 358).

For instance, the court of appeals, in Matter of Fallon, *supra,* held the following voting marks to be valid.



Ballot No. 39 Fig. 4 | Ballot No. 43 Fig. 5 | Ballot No. 86 Fig. 6 | Ballot No. 98 Fig. 7 | Ballot No. 104 Fig. 9

and the following voting marks to be void:



Ballot No. 13 Fig. 9 | Ballot No. 63 Fig. 10 | Ballot No. 146 Fig. 11 | Ballot No. 158 Fig. 12 | Ballot No. 169 Fig. 13

Under the Saxe law, each and every one of these voting marks is unquestionably valid. (Matter of Garvin, Appellate Division, Law Journal, June 9, 1915.)

Miscellaneous Marks: There are also a few other voting marks which occasionally appear.

Ballot No. 153 Fig. 14

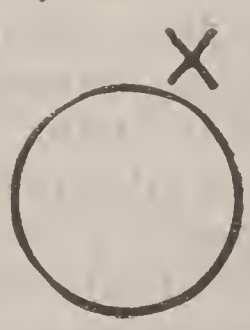
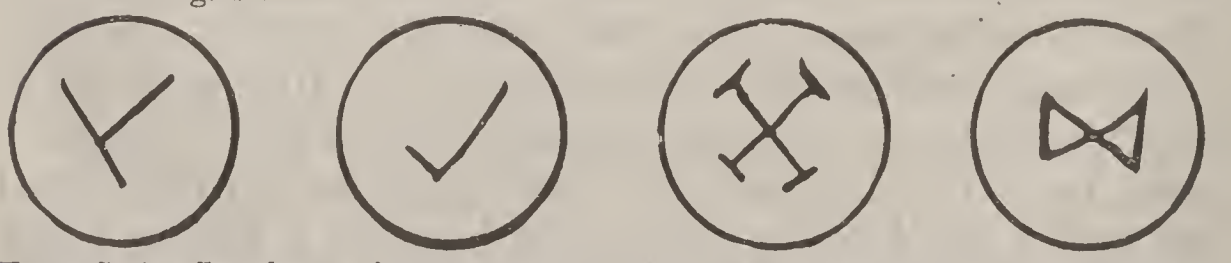


Fig. 15



From Judge Lambert's Ruling on the Marking of Ballots by John G. Saxe

Fig. 16 | Fig. 17 | Fig. 18 | Fig. 19

The cross mark in Figure 14 is a valid mark. It is immaterial if the arms of the cross mark extend beyond the circle providing they cross within it (Matter of Fallon, *supra;* see also People *ex rel.* Pierce *v.* Parkhurst, 24 Misc. 442; Ballots V, W), but the law requires the voter to make the lines cross within the voting space, so that the cross mark in Figure 15 renders the ballot void. (People *ex rel.* Wells *v.* Common Council, 154 N. Y. 750, affirming, on opinion of Parker J., below, 19 App. Div. 457.) The " T " in Figure 16 and the check mark in Figure 17 do not contain any line crossing any other line and are void (Matter of Garvin, *supra*), although where a ballot contains a number of crosses and the voter has carelessly failed to complete one of them, the courts usually sustain the validity of the ballot. (People *ex rel.* Pierce *v.* Parkhurst, *supra;* Judge Lambert's Rulings, *supra*). The cross mark, with feet, in Figure 18 was held valid by Judge Lambert and is undoubtedly valid under the Saxe law. The hour glass in Figure 19 was held invalid by Judge Lambert, but is validated by the Saxe law.

Effect of Saxe Law on Recounts: The Saxe law thus gives effect to the real intention of voters. It also goes a long way to prevent recounts. Unsatisfactory conditions of many polling places, poor eyesight and clumsy fingers result in a multitude of irregular voting marks in every polling place at every election. (People *ex rel.* Moran *v.* Sniffin, 123 App. Div. 730; Matter of Hearst, 48 Misc. 453), so that the courts early recognized that, to hold every ballot void on which a mark was found which was not a " single " cross mark consisting of " one straight line crossing another straight line," would be to annually disfranchise a substantial portion of the electorate and make elections a farce.

Thus the courts, from the first, imposed upon the statutory definition of a cross mark the further question of the voter's intent — was his mark made for the purpose of voting or did he intend to identify his ballot? — and if they found that the voter did not mark his ballot for identification, they held the ballot valid. Yet once the courts departed from the statutory definition, they found themselves in a legal puzzle department that permitted of an endless diversity of guess work for its various solutions. This condition led to recounts every year, which did nothing but afford opposing counsel an opportunity to display ingenuity as to what the various voters intended; and an examination of some of the highest court's decisions in the Fallon case indicates that, in recounts at least, it was truly only "the court of last conjecture." (Compare Figures 4 to 8 with Figures 9 to 13.) The stricter the rulings the greater the opportunity for legal guess work and the greater chance upon a recount, and yet recounts really were no more likely to be correct than the original canvass by the inspectors. Thus, Judge Lambert, after presiding over the counting of six hundred thousand ballots in the Hearst-McClellan recount, charged the jury, with great significance, that "it must appear plain to you, as it does to me, that the accuracy of the original count of the votes was quite as correct as we have reached in this proceeding." The Saxe law, by enacting a liberal construction of voting marks, effectually ended guess work as to the voters' intent. Recounts have been rare occurrences ever since.

TITLE 3.— BLACK LEAD PENCILS. WRITINGS. ERASURES. TEARS

The election law provides that it shall not be lawful to deface or tear a ballot or make an erasure. Any mark other than a cross mark makes the whole ballot void.

Black Lead: The use of purple lead (People *ex rel.* Obert *v.* Bourke, 30 Misc. 461, 465), ink or blue pencil clearly invalidates the ballot (Sec. 358; Judge Lambert's Rulings, *supra*).

Writings: Ballots containing the names of candidates written in the blank column whose names are already printed on the ballots are void. (People *ex rel.* Feeny *v.* Board of Canvassers, *supra;* Judge Lambert's Rulings, *supra.*) If the written name is misspelled, however, there is no presumption of identity and the ballot is valid. (People *ex rel.* Obert *v.* Bourke, 30 Misc. 461.) In writing a name on a ballot, a cross mark should not be used. (Jackson, A.-G., A.-G., Rep. of 1907, p. 555.) If a voter, in the honest belief that a vacancy exists for an office not printed on the ballot, writes in the name of the office and of his candidate therefor, his ballot is otherwise good, even if there is no such vacancy. (People *ex rel.* Dietz *v.* Hogan, 214 N. Y. 216; Matter of Murphy, 165 App. Div. 308.)

Crosses Opposite Blank Spaces: These are void. (Matter of Garvin, Appellate Division, Law Journal, June 9, 1915.)

Erasures: Ballots objected to because of erasures, cancellations or for being defaced cannot be counted. (Sec. 358; People *ex rel.* Feeny *v.* Board of Canvassers, *supra;* People *ex rel.* Obert *v.* Bourke, *supra;* Judge Lambert's Rulings, *supra.*)

Tears: Torn ballots are held to be valid, unless the tears conclusively appear to have been the act of the

voter. (Sec. 358; Thacher *v.* Lent, 71 App. Div. 483; Judge Lambert's Rulings, *supra.*)

Inclosures: If a voter does any act extrinsic to the ballot itself, such as inclosing any paper or other article in a folded ballot, such ballot is void (Sec. 358).

TITLE 4.—ALTERATIONS SUBSEQUENT TO VOTING

The validity and effect of a ballot must, of course, be determined as of the time the ballot is placed in the ballot box. In case it is determined as a fact by credible evidence that a mark or erasure thereon, which would invalidate or change the effect of the ballot if made by the voter, was made by some one *after* the ballot was voted, the validity and effect of the ballot must then be determined precisely as though the subsequent alteration had not been made.

TITLE 5.—STRAIGHT AND SPLIT VOTING OF MASSACHUSETTS BALLOT

Ballots for General Officers: In voting a ballot for general officers, it must again be stated, at the risk of repetition, that the voter votes either a straight or a split ticket in precisely the same way, by making a single cross mark for each candidate for whom he wishes to vote (Sec. 358, Rule 2).

TITLE 6.—STRAIGHT AND SPLIT VOTING OF PARTY COLUMN BALLOTS

The ballot for presidential electors remains in the party column form. The voter votes a straight ticket, that is, for each and every candidate of one party for elector by making a voting mark in the circle above the name of the party at the head of the ticket (Sec. 358, Rule 1). The voter may split a ballot for presidential electors in either of two ways—he may make a cross mark in the circle above the party column and also make a cross mark in one or more voting squares at the left

of the names of the candidates for whom he wishes particularly to vote and he then shall be deemed to have voted for the electors whose names are thus specially indicated and also for all the electors on the ticket so marked in the circle, except those whose names are opposite to the names so specially indicated (Sec. 358, Rule 3). He may also make a cross mark in the voting place at the left of each and every candidate for whom he wishes to vote (Sec. 358, Rule 2).

TITLE 7.—BALLOTS MARKED IN TWO OR MORE CIRCLES

Party Column Ballots: The ballots for presidential electors are party column ballots and some voters may make the error of voting in two party circles. A voter cannot vote for two sets of candidates. A ballot marked in two circles is ordinarily void or blank. If, however, it should happen that the name of some candidate appeared in both columns, the ballot should be counted for him and blank for the others. (People *ex rel.* Feeny *v.* Board of Canvassers, *supra*, 41; Matter of Fallon, Ballots 111, 120; but see Ballot 143, *contra.*) Similarly, where the name of a particular candidate appears on one ticket and there is no nomination on the other, the ballot should also be counted for him. (Matter of Fallon, Ballots 34, 51, 113, 164; but see Ballot 101, *contra.*)

Matter of Jerome (48 Misc. 441) presented a somewhat different question in that District Attorney Jerome's name was the only name in his column, so that the specific intention to split a party vote for him was as indubitably expressed by making a mark in the circle above his name as by making it in the voting space before his name and the court (Giegerich, J.) held either method equally valid. Indeed, the court went even further and held the voter could mark a Jerome ballot both ways and the extra cross would be

surplusage. The most radical decision of all — and one which is questionable — is one holding that, if a voter marks in two party circles, but, in addition, makes a voting mark for a candidate for some office on one of such tickets, his vote may be counted for the candidate so indicated, although he has an opponent on the other ticket. (People *ex rel.* Moran *v.* Sniffin, 123 App. Div. 730. See *contra*, Matter of Holmes, 30 Misc. 127.)

Ballots for Questions Submitted: If a voter votes both "yes" and "no" upon a single proposition his vote is obviously blank for that proposition, but it has been held that his vote for other propositions on the same ballot may still be counted. (Tamney *v.* Atkins, 151 App. Div. 309, reversed on a question of procedure, 209 N. Y. 202.

TITLE 8.—BALLOTS DEFECTIVELY PRINTED

The effect of defects in printing the ballot has already been considered in connection with printing the ballot (*ante*, p. 65).

ARTICLE XI

TOWN MEETINGS

The election law at one time was not generally applicable to town meetings. (Matter of Larkin, 163 N. Y. 201.) As now written, however, it contains many references to towns, town offices and town meetings (Secs. 45, 122, 132, 133, 183, 296–298, 311, 312, 316, 318, 332, 340, 341, 393, 419); and the town law expressly provides that it shall be applicable in most cases (Town Law, Articles 25–31). The provisions of the election law as to the review of ballots, however, do *not* apply to town meetings held at a different date than that of a general election. (Matter of Larkin, 163 N. Y. 201; Matter of Baldwin, 80 Misc. 263.)

ARTICLE XII

VILLAGE ELECTIONS TO DETERMINE PROPOSITION FOR INCORPORATION

The village law contains special provisions for elections to vote upon a proposition to incorporate (Secs. 2–20), including an appeal to the appellate division, which may set aside an election. (Sec. 18; Matter of Village of Webster, 102 App. Div. 202.) Under a former statute, a second election was a finality (People *v.* Snedeker, 160 N. Y. 350); but the present law permits any number of elections and appeals (Sec. 20).

ARTICLE XIII

SOLDIERS AND SAILORS ELECTIONS IN TIME OF WAR

Whenever, in time of war, any qualified voter is in the actual military service in the army or navy of the state or of the United States and by reason thereof absent from his election district, he shall be entitled to vote as fully as if he were present at his place of residence (Sec. 500). Polls are held at the quarters of an officer (Sec. 507) and the voter votes an official war ballot (Sec. 503).

ARTICLE XIV

ELECTION OF UNITED STATES SENATORS AND REPRESENTATIVES IN CONGRESS

TITLE I.—IN GENERAL

State Legislatures: The United States Constitution provides that the times, places and manner of holding

elections for senators and representatives shall be prescribed in each state by the legislature thereof, but congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators (Sec. 4, subd. 1).

Congress: It also provides that each house shall be the judge of the elections, returns and qualifications of its own members (Sec. 5, subd. 1).

Executive Writ: The United States Constitution also provides that when vacancies happen in the representation from any state in the house of representatives, the executive authority thereof shall issue writs of election to fill such vacancies (Sec. 2, subd. 5); and the recent constitutional amendment providing for the election of senators by the people makes a similar provision when vacancies happen in the representation of any state in the senate (Article XVII, subd. 2, in effect May 31, 1913). The reason for the requirement of an "executive writ" is that vacancies must be filled and not be permitted to continue. The constitution does not dictate to the several states the form of their respective executive governments, nor their respective systems of election, but it imposes upon the "executive authority" *or department* of any state in which a vacancy occurs the duty of issuing whatever process may be necessary *under the state law* to set in motion the election machinery of such state, and then it delegates to the legislature of each state power unlimited and duty imperative of prescribing "the times, places and manner of holding elections for representatives." In New York State the secretary of state is the "executive authority" in respect to elections (Secs. 293, 450, 129) and it is he who issues the writ of election (Sec. 293). No proclamation by the governor is necessary,

except for a special election (Matter of Wilkins, 158 App. Div. 523), that is, an election not held on the day of a general election (Sec. 292).

Decisions by Congress: Under these various constitutional provisions, congress has held that, where a state legislature has made provision for vacancies and elections, such statutes are mandatory. (Patterson *v.* Belford, 45th Congress, Rowell's Digest, 324, 325; Strobach *v.* Herbert, 47th Congress, Rowell's Digest, 362, 363.) It has also held that it is a well established and most salutary rule that, where the state courts of a state have given a construction to its constitution or statutes, that construction will be followed by congress. This rule has been held by congress to be "absolutely necessary" to the harmonious working of our complex government, state and national. (Tennessee Election, 42d Congress, Rowell's Digest, 261, 262, 263; California Case, 49th Congress, Rowell's Digest, 421; Noyes *v.* Rockwell, 52d Congress, Rowell's Digest, 476.)

Determination of Election: Each house is the judge of the elections, returns and qualifications of its own members (U. S. Constitution, Article I, Sec. 5). A candidate for either house may rightfully demand the aid of the state courts to enforce his rights under the state law in respect to the canvass or to his certificate of election (People *ex rel.* Brown *v.* Freisch, 153 Suppl. 277; Florida *ex rel.* Bisbee *v.* Board of Canvassers, 17 Fla. 9); but quo warranto does not lie (State *ex rel.* McDill *v.* Board of Canvassers, 36 Wis. 498; State *ex rel.* McCue *v.* Blaisdell, 18 N. D. 55; State *ex rel.* Barker *v.* Bowen, 8 S. C. 400; Nebraska *ex rel.* Wakely *v.* Lockwood, 3 Wall. 236).

TITLE 2.—ELECTION OF UNITED STATES SENATORS

Pursuant to the most recent amendment to the federal constitution, United States senators are now elected by the people (Article XVII), and in December, 1913, the New York legislature enacted a law providing for the direct election by the people of United States senators from New York State (Sec. 449, added by Laws of 1913, Chap. 822), and made adequate provision for the nomination of senators at direct primaries and their direct election by the people at the succeeding election. The Governor is authorized to fill a vacancy pending an election. (Secs. 45, 48, 449).

TITLE 3.—REPRESENTATIVES IN CONGRESS

The election law provides that a vacancy in the house of representatives occurring before October 15th in any year must be filled at the general election held next thereafter, unless previously filled at a special election. Upon the failure to elect to the office of representative in congress or upon the occurrence of a vacancy therein, the governor, in his discretion, may make a proclamation of a special election to fill such office, but a special election shall not be held to fill such a vacancy unless such vacancy occurs on or before the first day of July of the last year of the term of office or unless it occurs thereafter and a special session of congress is called to meet before the next general election or is called after October 14th of such year (Sec. 292). The election law also contains provisions on questions of procedure in the case of a representative resigning (Sec. 450).

ARTICLE XV

VOTING MACHINES

The board of elections of the city of New York and the common council of any other city, the town board of any town, or the board of trustees of any village, may adopt voting machines for use at general elections (Sec. 393). A state board of voting machine commissioners, appointed by the governor (Sec. 390), must examine, on application, any proposed voting machine and report on its accuracy, efficiency and capacity to register the will of voters; and if their report states that the kind of machine so examined can be safely used by voters at elections, under the conditions prescribed in the election law, it shall be deemed approved. No form of machine not so examined and approved can be used (Sec. 391).

A voting machine must be so constructed as to provide facilities for voting for such candidates as may be nominated, to permit an elector to vote for any person for any office, to permit voting in absolute secrecy and to prevent a voter from voting for a candidate or on a proposition for whom or on which he is not legally entitled to vote (Sec. 392).

The order of the lists or names of candidates of the several parties or organizations must be arranged as provided for blanket ballots (see Sec. 331, *ante,* p. 118), except that they may be arranged either vertically or horizontally. When the same person has been nominated for the same office to be filled at the election by more than one party or independent body, all the provisions relating to the official ballot shall apply and the voting machines must be so adjusted that his name shall appear but once on the ballot (Sec. 397).

The question of regulating voting machines so as to comply with the Massachusetts form of ballot is one fraught with some difficulty and one which caused a great deal of confusion at the election in 1914. In most cases the voting machines were constructed with the parties arranged horizontally and the offices perpendicularly. Where a candidate of one party was also nominated by another party, the machines were so constructed that the candidate's name appeared in the horizontal row of the party nominating him which had the uppermost row, and did not appear in the horizontal row of the party nominating him which had a lower row, with the result that the voters of the latter party, who wished to vote a straight ticket, did not have the same facility as those of the "upper" party to pull a straight row of levers, but were obliged to pull a lever in a higher row when they came to such office or omit to vote for the particular office altogether. In view of this situation, numerous applications were made to secure some remedy. In several cases, applications were made to dispense with voting machines altogether and to require the printing of paper ballots. In other cases, application was made to require the voting machines to be reconstructed, in technical violation of the statute, so that the candidate's name would appear more than once on the ballot, appearing in all the rows of the parties by whom he was nominated. These applications were based on two grounds, first, that the law, in so far as it provided that the name of a candidate should appear but once upon the ballot, was unconstitutional (Hopper *v.* Britt, 203 N. Y. 144), and second, on the ground that it was unfair to permit the voters of one party, in voting a straight ticket, to pull a row of levers running in a row, while the voters of

other parties were compelled to pull a row of levers which were not in a row. The courts are reluctant to attempt to interfere to regulate the use of voting machines (People *ex rel.* Hotchkiss *v.* Corwin, 152 App. Div. 920); and, while, in some cases, the court required the machines to be reconstructed so that the name of the candidate would appear as many times as he was nominated (Keogh, J., and Rudd, J.); in most of the cases the courts declined to interfere with the machines, either on the ground that the application was made too late (Andrews, J.) or upon the merits (Sutherland, J.) or otherwise (Laughlin, J.). In the case before Justice Sutherland, he held, in effect, that the present statute is constitutional. His reasoning was that, in Hopper *v.* Britt (203 N. Y. 144), the law held unconstitutional permitted voters of one party to vote a straight ticket by a single cross mark, while the voters of another party were not permitted to do so; whereas the present law requires every voter to pull as many levers as there are candidates for whom he wishes to vote.

The real problem is mechanical; being based on the difficulty of setting up a Massachusetts form of ballot on the face of a voting machine; and it seems that the legislature should examine into this subject and make an amendment of the law requiring voting machines to be uniform in character and make adequate provision that a candidate nominated by more than one party shall be sure to receive the number of votes cast for him on both tickets.

The provisions of the election law and the penal law relating to elections apply as far as practicable to voting machines (Sec. 417), but the law contains a good many provisions applying specially to voting by voting machines (Secs. 390–421).

The authorities of any city, town or village authorized to adopt a voting machine may provide for the experimental use of a machine at an election in one or more districts, without a formal adoption thereof, and its use at such election shall be valid (Sec. 394).

ARTICLE XVI

OFFICERS

TITLE 1.—OFFICERS ENUMERATED; RELATIVE FUNCTIONS

The election law provides for state superintendents of elections, their deputies and other subordinates, for boards of election, consisting of commissioners of election, and for their subordinates, for election officers, consisting of inspectors of election, poll clerks and ballot clerks, and for watchers and challengers.

The superintendents of election and their deputies constitute what amounts to a state elections constabulary, possessing and exercising, among other police powers, all the powers exercised by a sheriff.

The boards of election, on the other hand, are executive or administrative bodies, charged with the duty of executing the election laws.

Inspectors of election, poll clerks and ballot clerks are the "election officers" immediately in charge of the polling place.

TITLE 2.—STATE SUPERINTENDENT OF ELECTION

Historical: The office of state superintendent of election is political in its origin and existence. Its jurisdiction and duties, to a great extent, overlap the jurisdiction and duties of the boards of election and the police. It was the republican legislature of 1898, at

an extraordinary session, which first legislated on the subject, by creating the normally democratic counties of New York, Kings, Queens, Richmond and Westchester to be a new "metropolitan elections district" and creating a new officer, a "state superintendent of elections for the metropolitan district" to police the new district so created. (Laws of 1898, Chap. 676; Morgan *v.* Furey, 186 N. Y. 202.) This legislation gave to the republican party a certain political control of elections in the new metropolitan district. The condition continued until the year 1911, when a democratic legislature was elected, and, thereupon, that legislature made the law state-wide and increased the jurisdiction of the office to include primary elections (Sec. 489) and made a slight increase in the number of deputies. In 1915, the legislature passed a "party measure," repealing the provisions of law requiring bi-partisan deputies having the qualifications of election officers, and the requirement of an examination before their appointment, and otherwise opening wide the door for partisan intimidation of voters in New York City (Laws of 1915, Chap. 678).

Appointment of Officials: The law now provides for a single superintendent appointed by the governor for a term of four years; a chief deputy (Sec. 471), who shall be in charge of the branch office in New York City (Sec. 472); two hundred and thirty-three other deputies (Sec. 474), a secretary and necessary clerks, stenographers, and other employees, all appointed without nomination (Sec. 471).

Removal: The superintendent may be removed in the same manner as a sheriff (Sec. 471). All other officials may be removed by him at pleasure (Secs. 471, 474).

Superintendent: The superintendent and the deputies possess and exercise all the powers vested in a sheriff, as a conservator of the peace, either by statute or common law (Sec. 472). The superintendent has direction and control of all deputies and must assign them to election districts (Secs. 475, 479) and may make rules for their control and conduct (Sec. 475). He must, however, assign one hundred and fifty-seven deputies to duty in New York City (Sec. 475). The superintendent, or any deputy, may call on any person or public officer to assist them in the performance of their duty (Sec. 476). The superintendent may issue subpœnas, including subpœnas *duces tecum,* for the purpose of investigating any matter within his jurisdiction and of aiding in enforcing the provisions of the law (Sec. 477). The affidavit of a superintendent or deputy is made presumptive evidence under certain circumstances (Sec. 153; Matter of Morgan, 114 App. Div. 45). The superintendent or chief deputy and any designated deputies may administer oaths and affirmations (Sec. 478). The superintendent may attend at any election and each deputy, on election day, must attend the election at the polling place to which he is assigned. The superintendent and each deputy must be admitted at any time within any polling place and within the guard-rail thereof. It is the duty of the superintendent and of each deputy, during the election, to preserve order and to arrest any person violating or attempting to violate the law (Sec. 479).

The superintendent is also required to keep a card index of registered voters, prepared by the various inspectors of election at the time of registration (Sec. 485), and to prepare challenge lists for the protection of the ballot and the intimidation of voters in

New York City (Sec. 486, as rewritten by Laws of 1915, Chap. 678).

Deputies: The two hundred and thirty-three deputies, in addition to possessing the powers of a sheriff (Sec. 472) and preserving order and making arrests at the polls at general elections (Sec. 479), are given broad powers; but a "joker," inserted in the act of 1915, permits the superintendent to enforce the law strictly in one community, presumably New York City, while preventing the deputies from exercising these powers, on their own motion, elsewhere (Sec. 475, as amended by Laws of 1915, Chap. 678). The law, prior to the enactment of this 1915 joker, provided that the deputy superintendents, "when directed" by a superintendent, "shall, *or on their own motion,* or on complaint of any citizen of the State, *may*" exercise these broad powers (Sec. 475). The 1915 amendment struck from the law the word "or" where it first appears, as follows: "Such deputies," "when directed" by a superintendent "*shall,* [or] *on their own motion,* or on complaint of any citizen of the state, may," etc., so that the words "on their own motion" now connect with the preceding "shall" instead of the following "may," and become nugatory. The fertile designers of the "joker" did not strike out the words "on their own motion," because such an amendment would have been likely to attract notice; but, by striking out the word "or," they successfully accomplished the same result and the two hundred and thirty-three deputies can now exercise their powers only in cases where they receive an express direction from the superintendent, or where there is a citizen's complaint. The broad powers which they may exercise under these

restricted circumstances relate to arrest without warrant, execution of warrant, investigation and inspection, including, for instance, the right to visit and inspect any house or dwelling and interrogate any inmate (Sec. 475). This right of inquisition, however, can only be exercised for investigating registration, so that before registration, an inmate of a lodging house may properly refuse to answer such a simple question as "Are you married?" (People *v.* Carleton, 41 Misc. 523.) Deputies may now attend at primaries (Sec. 489, as amended by Laws of 1915, Chap. 678).

Clerks: Clerks are given power, when directed by the superintendents, to administer oaths and affirmations (Sec. 472).

Liability: A superintendent is not liable for directing a deputy to present an information to a magistrate, who issues a warrant thereon, without requiring sufficient proofs, so that an innocent citizen is wrongfully arrested. The superintendent could not assume that the magistrate would act without jurisdiction. (Tanzer *v.* Breen, 139 App. Div. 10.)

Lodging Houses, Dwellings, Hotels: The superintendent is also vested with broad supervisory powers over lodging houses and hotel keepers. In this connection, the law calls for elaborate reports to be made by lodging house and hotel keepers (Sec. 480), affidavits by hotel keepers holding liquor licenses (Sec. 481), reports by police and certain departments (Sec. 483), and lists to be furnished by the owner or lessee of any hotel or inn containing less than fifty rooms, and every lodging house or dwelling (Sec. 484). The scope of these reports, affidavits and lists is indicated by the requirements of the reports to be made by

lodging house and hotel keepers, which must state, among other things, the names of all persons living therein who claim a voting residence thereat and their color, age, height, weight, color of hair, marks on face or hands, complexion and any other distinguishing marks, and their birth place, occupation, place of business and room, and the signature of each such person (Sec. 480).

TITLE 3.—BOARDS OF ELECTION

The law provides for a board of elections, consisting of four commissioners, for the city of New York, and for a separate board of elections, consisting of from two to four commissioners, for every other county (Sec. 190, as amended by Laws of 1913, Chap. 800). Each board must be bipartisan (Constitution, Article 2, Sec. 6; Election Law, Secs. 190, 196), and is charged with the duty of executing the laws relating to all elections held within its respective cities or counties (Secs. 190, 206).

In New York City, the board of aldermen appoints the board of elections; elsewhere, the board of supervisors (Sec. 191). These appointments are made upon recommendation of the two political parties which cast the highest and next highest vote for governor at the last election (Secs. 194–5). A commissioner must be a resident and elector of the political subdivision for which he is appointed and is disqualified from being a candidate for any elective office during his term of office (Sec. 191).

At their first meeting, the commissioners organize as a board by electing a president and secretary. Each

board has power to adopt rules and regulations for the transaction of its business and for the control and conduct of its officers and employees (Secs. 192, 207). It fixes the number, salaries, duties and rank of its chief clerks, clerks, assistant clerks and stenographers, and appoints and removes at pleasure and fixes the salaries of all its employees, but with certain limitations and exceptions (Secs. 190, 197, as amended by Laws of 1913, Chap. 800). It is the custodian of primary records (Sec. 202). Its offices are public and open every business day, during hours designated by it (Sec. 207). On the last day to file certificates of nomination, it is a commendable practice to keep the office open until midnight. (Matter of Norton, 34 App. Div. 79, appeal dismissed, 158 N. Y. 130.) All records in its offices are public and open for inspection and for the making of copies. Minutes of all its meetings must show how each commissioner voted upon any resolution or motion (Sec. 208).

Police: The police, from the commissioner to members of the force, whenever called upon by the board, must render it all possible assistance; and the commissioner, upon written request, must detail to its service such patrolmen and other police as may be necessary (Sec. 199).

TITLE 4:— ELECTION OFFICERS

There must be, in every election district, the following "election officers:" Four inspectors, two poll clerks, and two ballots clerks (Sec. 302), who shall serve at every primary (Sec. 70), general, special or other election held within their districts during their term of office. The term is one year, except for inspectors in towns, where it is two years (Sec. 302).

Qualifications: Each class of officers must be bipartisan (Constitution, Article 2, Sec. 6; Election Law, Sec. 302). Their qualifications are as follows: Qualified voter of the county, if in New York City; or of the city, if in any other city, or of the election district of the town in which he is to serve. Good character. Able to speak and read English understandingly and write it legibly. General knowledge of the duties of the office. There are also a number of disqualifications (Sec. 302).

Appointment: In New York City, the board of elections and, in other cities, the mayor and, in towns, the town board (Sec. 311) appoints the election officers (Secs. 303, 306). This is done on nomination by the parties (Secs. 303, 304, 306), except that in towns the inspectors, upon appointment, in turn appoint the poll clerks and ballot clerks (Sec. 312). The nomination by parties is made by filing party lists, duly authenticated. If two factions of the same party file lists, the law provides for preference to the faction recognized by the state committee (Sec. 304). If a list in New York City is authenticated by the chairman of the county committee, as provided in the election law (Sec. 304, as amended by Laws of 1915, Chap. 678), that list must be recognized (Sheehan *v.* McMahon, 44 App. Div. 63), even if the faction represented by such chairman was not recognized by the preceding state convention, because the primary election must be regarded as an even more authoritative recognition than the action taken by the state convention. (People *ex rel.* McCarren *v.* Dooling, 128 App. Div. 1, affirmed, 193 N. Y. 604.) Each person proposed for appointment must take an examination, unless he has served at any previous election (Sec. 305).

Vacancies and Absentees: The law suitably provides for supplying vacancies and absences of inspectors, poll clerks and ballot clerks. The power of appointment is vested in one of the remaining officers of the same political faith and the appointee must also be of the same political faith and a qualified voter of the district. If an inspector is absent, the remaining inspector appoints. If both inspectors, the poll clerk, or if he also is absent, the ballot clerk. If a poll clerk or ballot clerk is absent, the two inspectors appoint (Sec. 313).

Removal: In cities of the first class, the board must remove an election officer, without charges or notice, upon the written request of the official of the party who certified such officer's name; otherwise election officers cannot be removed except for cause and after notice, unless for improper conduct as an election officer when actually on duty (Sec. 308).

Transfer Prohibited: No election officer may be transferred from one election district to another after he has entered upon the performance of his duties; and no election officer may serve in any county save that in which he resides (Sec. 308).

Inspectors: Inspectors act as a board of registry at registration, as a board of inspectors during primary and general elections, and as a board of canvassers at the close of the polls (Sec. 314). They appoint one of their number chairman (*ante,* p. 101) and determine questions by majority vote (Sec. 314). They act ministerially, never judicially (*ante,* p. 10). All meetings of inspectors must be public. Each individual inspector, however, has full authority to preserve peace and order at any meeting and at elections and to enforce obedience to his command, and may appoint

one or more voters to assist him in so doing. Any inspector may order the arrest of any person other than an election officer violating or attempting to violate the law (Sec. 315). The inspectors, however, under the pretense of keeping order, cannot turn out a peaceful and quiet citizen whose presence does not interfere with the discharge of their duties. (Horton *v.* Whister, 4 State Rep. 810.)

Poll Clerks: Poll clerks keep a record of the persons voting or offering to vote and tally the votes during the canvass thereof. Each poll clerk at each polling place has a poll book. On one of the poll clerks, designated by the chairman, is also imposed the duty of reading the questions on the identification statement for election day and reading the answers thereto (Sec. 355). Under the provisions of the law, poll clerks must sign certain of their statements at certain particular periods of time (*ante*, p. 108).

Ballot Clerks: Ballot clerks fold and deliver the ballots to voters. Upon the delivery of an official ballot the ballot clerks announce the voter's name and the number of the stub, and they must make a similar announcement when any ballot is returned to them (Sec. 354). They also prepare and sign a written statement or return of ballots to be attached to the statement of canvass accounting for the full number of ballots received (Sec. 337).

TITLE 5.—WATCHERS

At primary elections, any political party or any two or more candidates may appoint one watcher for each election district. Any person, apparently, is qualified to act as such a watcher (Sec. 84). On reg-

istration days and also at general elections, each political party or independent body may appoint as many as two watchers for each election district. Such watchers must be qualified electors of the county in which the election district is located (Secs. 152, 352). At all elections, before any ballots are received, watchers are entitled to have the boxes examined in their presence (Secs. 84, 350). They may be present and within the guard-rail (Secs. 83, 84, 351) until after the completion of the canvass (Secs. 84, 88, 352). On registration days, they are also entitled to be present until the end (Sec. 152). At all elections, during the canvass, they are entitled to carefully read and examine any and all ballots (Secs. 85, 371).

At the election, 1915, there may be two women watchers in each polling place upon the vote on the proposed women's suffrage amendment (Secs. 152, 352, as amended by Laws of 1914, Chap. 242).

TITLE 6.— CHALLENGERS

At primary elections, any three or more candidates of each party are entitled to at least one challenger (Sec. 84) and at general elections, each party or independent body is entitled to at least one challenger (Sec. 352). Any person apparently is qualified to act as a challenger at primary elections, but, at general elections, a challenger must be a qualified elector of the county in which the election district is located (Sec. 352). At both primary and general elections, challengers are entitled to remain just outside the guard-rail where they can plainly see what is done within the rail, outside of the voting booths, from the opening to the closing of the polls (Secs. 84, 252).

Part Third

CORRUPT PRACTICES

ARTICLE I

IN GENERAL

The election law contains an article dealing with the subject of corrupt practices, but the penal law also contains a number of important provisions on the same subject and the civil service law another; and in 1914 an officer of one of the parties was obliged to plead guilty to an indictment based upon another provision *hidden away in the general corporation law.* This condition of the statutory law is one which is likely, at any time, to work hardship on candidates and members of political committees and obviously calls for the codification of all of the provisions on the subject into a single law. In this part, an attempt will be made to collate the various provisions.

ARTICLE II

LEGAL EXPENDITURES AND CONTRIBUTIONS

Title 1.—Legal Expenditures

The penal law distinguishes between legal expenditures and contributions. It makes it a misdemeanor for any person to supply meat, drink, tobacco, refreshment or provisions, other than as part of the traveling expenses of candidates, political agents, committees or public speakers, or to pay, lend or con-

tribute any money or other valuable consideration for any other purpose than a list of purposes which are known as "legal expenditures." This list includes rent of halls, compensation of public speakers, music, fireworks, carriages, food for watchers, traveling expenses and the like (Sec. 767).

TITLE 2.—LIMITS OF AGGREGATE LEGAL EXPENDITURES AND CONTRIBUTIONS

The penal law limits the amounts to be expended by a candidate for a public office either for legal expenditures or contributions to political committees or for any other purpose, and makes it a misdemeanor for any candidate to expend an amount in excess thereof (Sec. 781). These limitations are as follows:

Candidate for governor	$10,000
Candidate for any other elective state office, other than a judicial office	6,000
Candidate for congress or presidential elector	4,000
Candidate for state senator	2,000
Candidate for assembly	1,000
Other candidates	500 and $3 for each 100 votes cast in such district at the last state election in excess of 5,000 votes.

TITLE 3.—JUDICIAL CANDIDATES

The penal law provides that no candidate for a judicial office shall make any contribution, nor shall any contribution be solicited of him; but he may make "legal expenditures" (Sec. 780).

TITLE 4.—SOLICITATIONS

The penal law authorizes a request for a contribution of money by an authorized representative of the

political party, organization or association to which a candidate for an elective office belongs; but otherwise it makes it a misdemeanor for any person to solicit money or other property from a candidate, or to seek to induce a candidate to purchase any ticket, card or evidence of admission to any ball, picnic, fair or entertainment of any kind (Sec. 779).

The penal law also makes it a misdemeanor for any person to solicit money or other property from a candidate for an elective office, as a consideration for a newspaper or other publication supporting such candidate (Sec. 755).

TITLE 5.—CONTRIBUTIONS FROM GOVERNMENTAL EMPLOYEES

The civil service law prohibits the solicitation of any political assessment, subscription or contribution from any officer, agent, clerk or employee under the government of the state of New York or any civil subdivision or part thereof. No person shall enter or remain in any office building or room, occupied for governmental purposes, or send or direct any letter or writing thereto for the purpose of securing a political assessment. There are also other specifications. The violation of any provision is made a misdemeanor (Sec. 26).

TITLE 6.—CONTRIBUTIONS FROM CORPORATIONS AND JOINT STOCK ASSOCIATIONS

The general corporation law contains comprehensive prohibitions against any corporation or joint stock association, except a corporation or association organized or maintained for political purposes only, making any campaign expenditure and it makes it a

misdemeanor for any officer, director, stockholder, attorney or agent of any corporation or joint stock association to violate any of such provisions, or to participate in, aid, abet or advise or consent to any such violation or to solicit or knowingly receive any money or property in violation thereof. Provision is also made for the attendance of witnesses and the production of books and documents upon any investigation, proceeding or trial. (General Corporation Law, Sec. 44.)

ARTICLE III

STATEMENTS

Both the penal law and the corrupt practices article of the election law deal with statements of campaign contributions and expenses.

Political Committees and Their Statements: The corrupt practices article defines political committees so as to include any combination of three or more persons co-operating to aid or to promote the success or defeat of a political party or principle, or of any proposition, or to aid or take part in the election or defeat of any candidate (Sec. 540). Every political committee must have a treasurer, and must file with the secretary of state a statement of his name and address, signed by three members of the committee, within five days after he is chosen (Sec. 543). Within twenty days after election, the treasurer must file a statement setting forth all the receipts, expenditures, disbursements and liabilities of the committee and of others in its behalf (Sec. 546). This statement is a summary of the financial business of the committee and need not contain the "detailed accounts" of moneys required to be made to him of moneys received from him. (Matter of McLennan, 65 Misc. 644, affirmed on opinion of Andrews, J., below, 142 App. Div. 926, affirmed 204 N. Y. 608.)

Candidates' Statements: The Penal Law requires each candidate, under penalty of a misdemeanor, to file, within *ten* days after election, a verified itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, or through any other person, in aid of his election. Such statements must give the names of the persons who received such moneys, the specific nature of each item and the purpose for which it was expended or contributed (Sec. 776.) The corrupt practices act provides that *any* person, *including a candidate,* who makes any expenditure or contribution in connection with an election, except to a candidate or political committee or duly authorized agent thereof, or except for personal expenses, shall file the statement required of treasurers of political committees (Sec. 542). The statements to be filed by a candidate or other person not a treasurer must be in like form as that filed by a treasurer, but in statements filed by a candidate there shall also be included all contributions made by him (Sec. 546). The corrupt practices act provides that all statements required by it must be filed with the secretary of state, except in those cases where a candidate is required to file a statement elsewhere by the penal law (Sec. 547). The secretary of state must provide suitable blank forms (Sec. 549). The penal law provides that candidates for state offices or of any division greater than a county, must file their statements with the secretary of state. Candidates for town, village and city offices, except in the city of New York, file their statements with the town, village or city clerk. Candidates for other offices, including all offices in the city and county of New York, file their statements with the clerk of the county wherein the election occurred, unless the county has a commissioner of elections, in which case, candidates file their statements with such commissioner (Sec. 776). In

New York City there is some confusion as to whether statements affecting candidates for office of a division less than the whole city, should file their statements with the county clerk or with the board of elections; but the practice is for candidates for county offices and for the assembly to file their statements with the county clerk and for other candidates to file their statements with the board of elections. Thereafter, the officer with whom the statement is filed makes a certified copy thereof and files it with the secretary of state.

Enforcement of Corrupt Practices Article: Upon default in the filing of a statement required by the corrupt practices article, provision is made for summary contempt proceedings (Secs. 550–560). It is questionable, however, if these summary proceedings have constitutional support. (Matter of Lance, 55 Misc. 13.)

ARTICLE IV

MISCELLANEOUS PROVISIONS

The corrupt practices article also contains certain other requirements.

Contributions: Campaign contributions must be made under the true name of the contributor (Sec. 547).

Payments, Vouchers: All payments required to be accounted for, unless the total expense payable to one person be not in excess of five dollars, must have a receipted voucher stating the particulars of expense, and all such vouchers must be preserved for fifteen months after the election to which they relate(Sec. 545).

Use of Party Funds at Primaries: The law contains an express prohibition against the use of party funds in connection with primary elections (Sec. 562, as amended by Laws of 1913, Chap. 820).

Part Fourth

PROCEDURE

ARTICLE I

POLICY AS TO JUDICIAL REVIEW

In reviewing the statutes and decisions relating to judicial proceedings, the most important consideration to be borne in mind is that it is the policy of the state to intrust to bi-partisan boards of officers the duty of registering voters, distributing ballots and receiving, recording and counting votes at election (Constitution, Art. 2, Sec. 6); and that all such matters have been repeatedly held to be within the exclusive province of such boards and are subject to review by the courts only where the legislature has specially provided a proceeding for such review. Thus, in Hearst *v.* Woelper, 183 N. Y. 274, the court of appeals held that the provisions of the law are to be given the fullest effect which they permit; but no construction by the courts is justified which permits judicial interference with, or revision of, elections beyond what is plainly found to be authorized by the statute. Similarly, in Metz *v.* Maddox, 189 N. Y. 460, 468, the court of appeals declared that the actual count and determination of the result of the count of the ballots has always been the exclusive province of the board of canvassers, although, of course, the officers making the false count may be punished for their crime. Their false determination is no protection to them. Similarly, in Tamney *v.* Atkins, 209 N. Y. 202, where an attempt was made to require the inspectors to recount void and protested ballots *upon questions submitted*, the court held that the relator had no right to

invoke section 381 of the election law, authorizing a writ of mandamus upon the application of any *candidate* voted for at an election, to review the void and protested ballots, and held that the privilege of instituting proceedings for review depends upon legislative enactment, and if the legislature, as a result of fixed policy or inadvertent omission, fails to give such privilege, the courts have no power to supply the omission.

In Schieffelin *v.* Komfort, 212 N. Y. 520, the court of appeals considered at great length the jurisdiction and powers of the judiciary as guardians of the rights of the people generally against illegal acts of the executive and legislature; and declared that it had no such general paternal jurisdiction (*ante,* p. 20).

ARTICLE II

VARIETIES OF PROCEDURE IN ELECTION CASES

If the legislature authorizes a court review, the judiciary may take jurisdiction to decide test questions of election law long in advance of elections and may also retain jurisdiction to decide abstract questions long after its decision in the particular case has become academic. It may act through any one of the courts or through a justice thereof. The form of its procedure may be a summary proceeding or it may be in the nature of a suit at common law for damages, or the more elaborate procedure of quo warranto, mandamus, habeas corpus or certiorari. In considering these various questions, the time of making decisions will first be taken up and then the various methods of procedure. For the purpose of convenience, however, the tribunal, whether a court or a justice, will be uniformly referred to as a court.

ARTICLE III

DECISIONS AS AFFECTED BY POINT OF TIME

TITLE 1.— PROCEEDINGS FOR INSTRUCTIONS PRIOR TO CONTROVERSY

Ordinarily, the courts do not assume jurisdiction to decide questions in advance of some action, taken or refused, actually involving the rights of persons interested in the question sought to be determined; but, if a question relates to the duties of public officers in matters of a public nature, the courts will assume jurisdiction in exceptional and extraordinary cases, to decide important questions of election law in advance of an actual controversy. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231; State *ex rel.* Morris *v.* Wrightson, 56 N. J. L. 126.)

TITLE 2.— DECIDING QUESTIONS NOT MATERIAL TO CONTROVERSY

The courts have even gone so far in an important case as to decide, on a preliminary motion for a bill of particulars, questions which could only arise upon the trial. (People *v.* McClellan, 191 N. Y. 341.) In the case cited, Gray, Vann and Werner, JJ., dissented, and insisted that the " undoubted importance " of the case " furnishes no reason to assume a function, which, in a less important case, it would unhesitatingly declare improper to exercise."

This is consonant with the well settled rule that courts will not inquire into the constitutionality of an act of the legislature until a concrete case arises in

which a decision of such question is unavoidable for the determination of the case itself. (Hanrahan *v.* Terminal Commission, 206 N. Y. 494, 504.)

TITLE 3.— ABSTRACT QUESTIONS AFTER CONTROVERSY ENDED

The general practice of the courts is to refuse to decide abstract questions after the question involved has become abstract by lapse of time (People *ex rel.* Geer *v.* Common Council, 82 N. Y. 575; Matter of Manning, 139 N. Y. 446; Matter of Norton, 158 N. Y. 130; Croker *v.* Sturgis, 175 N. Y. 158, 163); but the courts will ordinarily decide a question relating to the election law, even after the election to which it relates has been held. (Matter of Gage, 141 N. Y. 112; Matter of Madden, 148 N. Y. 136, 139; Matter of Fairchild, 151 N. Y. 359, 361; Matter of Social Democratic Party, 182 N. Y. 442; People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670, 671; Matter of Titus, 117 App. Div. 621, affirmed 188 N. Y. 585; Schieffelin *v.* Britt, 150 App. Div. 568; Matter of King, 155 App. Div. 720.)

TITLE 4.— PROMPT DETERMINATIONS

It is the duty of courts and judges entertaining proceedings under the election law to speedily decide the questions presented to them. (Matter of Hennessy, 164 N. Y. 393.)

ARTICLE IV

SUMMARY PROCEEDINGS

TITLE 1.— IN GENERAL

The election law provides for a variety of summary proceedings. These are founded on separate provisions of the statute, which vary in their terms as to the particular court or justice to whom the application shall be made, the party entitled to make the same, the notice that must be given, how such notice must be served and in many other particulars. In considering them, the substance will be given, and the reader can readily secure such additional detail as he may require by referring to the particular section cited in each instance. It should be borne in mind, however, that these various summary proceedings are statutory, dependent upon special provision of law, and where the legislature decrees that jurisdiction shall be obtained only in a certain way, that way must be followed to the exclusion of all others, and unless it is, the service made is ineffectual for any purpose. (Eisenhofer *v.* New Yorker Publishing Co., 91 App. Div. 94.)

The courts have recognized the confusion created by the number of varying provisions and hold that the mere fact that the moving party refers to the wrong section is immaterial and a case will be disposed of in accordance with the facts as they appear. (Matter of Haugh, 141 App. Div. 26.)

TITLE 2.— ENROLLMENT

Improper Denial of Enrollment: Where a board improperly refuses to enroll a voter, he is entitled to a writ of mandamus. (Matter of Guess, 16 Misc. 306.)

Review of Enrollment: The law provides for summary proceedings to review enrollment both in cases of false statements, death or removal from the election district (Sec. 23) and cases where claim is made that an enrolled voter is not in sympathy with the principles of the party with which he is enrolled (Sec. 24). The right to institute either proceeding is given to any enrolled voter of the same political party residing in the assembly district in which the election district, whereat the voter proceeded against is enrolled, is located. In the first class of cases, the application is made directly to the court; in the latter, to the chairman of the county general committee, who hears the matter and, if it appears by sufficient evidence that the person is not in sympathy with the principles of the party, files a certificate with the board of elections, setting forth the reasons why the voter's name should be stricken from the enrollment book; and it thereupon becomes the duty of the board of elections to make application to the courts. In either class of cases the court, after notice, makes such final order as the facts warrant.

Evidence: The provisions requiring " sufficient evidence " in cases of alleged death or removal from the election district must be strictly complied with. (Matter of Titus, 117 App. Div. 621; Matter of O'Brien, 117 App. Div. 628; Matter of McGuire, 117 App. Div. 637; all affirmed 188 N. Y. 585; Matter of Heineman, 124 App. Div. 918.)

Notice: An order to show cause why a voter's name should not be stricken from the enrollment book must be returnable on a day at least ten days before a primary election and a copy thereof served on the person proceeded against either personally or by mail and on the board of elections " at least forty-eight hours be-

fore the return thereof.'' Any number of hours less than forty-eight hours is insufficient. (People *ex rel.* Clancy *v.* Bingham, 123 App. Div. 226; Matter of Striking 539 Names from the Enrollment Books of the 29th Assembly District, Law Journal, September 13, 1909.)

Error: Where application is made to strike a name from the enrollment of a given year, it is fatal to refer to such enrollment as the enrollment of the year previous, although made in that year. (Matter of Watson, 193 N. Y. 612.)

TITLE 3.—MEMBERSHIP OF PARTY COMMITTEES

Elections: The election law provides that the election of members to any party committee may be reviewed by summary proceedings upon the petition of any person qualified to vote at the primary election of the party which such committee represents (Sec. 41).

Removals: The law also provides for summary proceedings to review the action of any committee in removing one of its members. Such application is by petition of the person so removed (Sec. 42).

TITLE 4.—DESIGNATIONS AND PRIMARIES

Review of Designations: The election law authorizes the filing of objections to any designation within three days after the date of filing, and provides that the questions raised by such objections shall be heard and determined as prescribed in relation to questions with reference to names or emblems on a certificate of nomination (Sec. 55-a, see *post,* p. 166). The effect of this statute is to overrule the decision in Matter of Salter (76 Misc. 33).

The objector may be barred for laches. (Matter of Rathborne, 164 App. Div. 916.)

Consolidation: Similar proceedings may be consolidated (Sec. 55-a).

Correction of Designations: The Supreme Court is without power to make an order, *nunc pro tunc,* authorizing an amended designating petition to be substituted for a faulty petition after the time in which to file designations has expired. (Matter of King, 155 App. Div. 720.)

Review of Primaries: Any action or neglect of the officers or members of a political convention or committee, or of any inspector of primary election, or of any public officer or board with regard to the right of any person to participate in a primary election, convention or committee, or to enroll with any party, or with regard to any right given to or duty prescribed for, any voter, political committee, political convention, officer or board, is reviewable by summary proceedings upon the petition of any person aggrieved thereby or upon petition presented by the chairman of any political committee. The court should consider, but need not be controlled by, any action or determination of the regularly constituted party authorities upon the questions arising in reference thereto, and shall make such decision and order as, under all the facts and circumstances of the case, justice may require. The action of any custodian of primary records in canvassing and certifying the result of any primary election, or of the secretary of state in preparing and certifying the list of delegates to any convention or members of a state committee may be reviewed in like manner. The court may subpoena or examine witnesses or in its discretion hear and determine the case on affidavits. In case the court finds and determines that both parties to a controversy have been guilty of frauds or that

a primary has been so permeated by fraud as to render it impossible to determine the true result thereof, it may direct the holding of a new primary (Sec. 56).

Prima Facie Case: In attempting to review a primary election, the moving party must make out a case, and even where gross frauds and irregularities are charged and feebly and unconvincingly denied, no case is presented if it is reasonably clear that the acts complained of could not have affected the result and at most served only to swell the apparent majority of the successful candidate. (Matter of Coughlin, 198 N. Y. 613, affirming 137 App. Div. 283, on opinion of Scott, J., below.)

Relief Granted: In the case of another primary election, one held at Watervliet in 1905, where the brother of one of the candidates acted as chairman of the board, kept the boxes on the floor, permitted ballot stuffing and, after his brother's votes had been counted, apparently welcomed a brick which arrived through the window and was succeeded by darkness, thereby ending the counting of the opponent's votes, the court ordered a new primary election. (McLaughlin *v.* Connors, 185 N. Y. 545.) In other cases, the courts have gone even further and after setting aside a certificate of election already issued have summarily determined that another candidate is entitled thereto and directed the issuance of a certificate to him. (Rabbitt *v.* Garand, 89 App. Div. 119; Walsh *v.* Church, 115 App. Div. 82.) In a more recent case, the court directed a recanvass. (Matter of Ward, 78 Misc. 15.)

Scope of Review: Under the law as it read prior to 1911, the jurisdiction of the courts was held to be limited, relating solely to matters within the jurisdiction of the board whose action was being reviewed. (Mat-

ter of Hines, 141 App. Div. 569.) For instance, the courts held they could not review the action of a board which declined to add together the votes for a candidate apparently voted for under two different names. (People *ex rel.* Calihan *v.* Hunt, 75 App. Div. 33; Matter of Sweeney, 158 App. Div. 496, reversed, on a question of procedure, 209 N. Y. 567.) The legislature of 1911, however, revised and liberalized the provisions on this subject (Laws of 1911, Chap. 891) and the decisions cited are probably not conclusive. (Matter of Zimmer, 77 Misc. 336, Pooley, J.)

Injunction: A temporary injunction granted in connection with summary election proceedings is ordinarily unauthorized and void (*post,* p. 190).

TITLE 5.—CERTIFICATES OF NOMINATION. NAMES AND EMBLEMS

Any question arising with reference to any emblem or to any name designated in any certificate of nomination or with reference to the construction, sufficiency, validity or legality of any certificate may be determined by the court upon the application of any citizen (Sec. 125). Any questions raised by objections filed to a designation (Sec. 55a) or to a certificate of nomination may be heard and determined in the same manner (Sec. 134). If the certificates of nomination of two or more different parties or independent bodies designate the same or substantially the same emblem or party name, the court must decide which party or independent body is entitled to the use thereof, being governed as far as may be in its decision by priority of designation in the case of the emblem, and of use in the case of the party name. If

there be a division within a party, and two or more factions claim the same or substantially the same emblem or name, the court must decide between such conflicting claims, giving preference of emblem and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities (Sec. 125).

Notice: Notice must be given to the candidate affected. (Sec. 134; Matter of Sweeney, 209 N. Y. 567.)

Scope of Proceeding: This proceeding cannot be invoked to determine the qualifications of a candidate. (Matter of Independent Nominations, 186 N. Y. 266, 279.)

Consolidation: Similar proceedings may be consolidated (Sec. 125, as amended by Laws of 1914, Chap. 244).

Reform in Procedure: The present statute was enacted in 1911 and marked a distinct reform in procedure. (Laws of 1911, Chap. 649.) Under the former practice, application had to be made, in the first instance, to a board of elections, which had but a brief time to decide the questions before it. The board in New York City was frequently compelled to sit all night and day and, even then, it frequently decided important questions, on partisan lines, by agreeing to disagree, voting two and two, and throwing a mass of undigested litigation into the courts at the eleventh hour and barely permitting a decision by any appellate court in sufficient time to allow the printing of the ballots. The law of 1911 eliminated this preliminary hearing by boards of elections and provided for orderly proceedings in the courts which afford reasonable time for an appeal and the printing of the ballots.

Final Order: In all proceedings brought under section 125, the law now provides that the final order at special term must be made on or before the twelfth day (Thursday) or, in case of a certificate of nomination of a town or village officer, the seventh day (Tuesday) before election (Sec. 125, as amended by Laws of 1913, Chap. 820). The provisions of law prior to the amendment of 1913, requiring the final order to be made fifteen days before election (Monday) were held to be not mandatory. (Matter of Emmet, 150 N. Y. 538; Matter of Hennessy, 164 N. Y. 393; Matter of Herman, 108 App. Div. 335.) Accordingly, an application was held to be timely where the last day of registration fell on Saturday, the seventeenth day before election, and an order to show cause was secured on Monday and made returnable on Wednesday; otherwise the object of the statute in respect to certificates and objections would be frustrated. (Matter of Stoddard, 158 App. Div. 525.) Where, however, the applicant has ample time to comply with the terms of the statute, his failure to do so must be fatal to his application. (People *ex rel.* Tuers *v.* Dooling, 141 App. Div. 918, affirming 69 Misc. 391, on opinion of Stapleton, J., below.)

TITLE 6.— REGISTRATION

The election law provides for summary proceedings to be instituted not later than twelve days before election to direct inspectors of any election district to convene as a board of registration on the second Saturday before election, to place upon the register the name of any person entitled to have his name placed

thereon omitted through the fault, error or negligence of the election officers, or to strike from the register the name of any person who will not be qualified to vote in such election district at the election for which registration is made. The latter application may be made by any elector of the town or city in which the election district is located (Sec. 153).

An application to add a voter's name cannot be made after the last day of registration on the ground that he has registered in the wrong district. This is not "through the fault, error or negligence" of the "election officers," that is, of the *right* district, but is through his own negligence, concurred in by the inspectors of the wrong district. (Matter of Hart, 25 Misc. 93, Gaynor, J.)

Where an application is made to strike names from the register, an affidavit by the superintendent of elections, or by any deputy duly deputed for that purpose, stating certain facts specified in the law, is presumptive evidence against the right of the voter to register from such premises (Sec. 153; Matter of Morgan, 114 App. Div. 45); but no application to strike a name from a register will be granted in a case of doubt, nor in one resting in some uncertainty or dependent upon inferences of a debatable character, but only in a case in which the facts show affirmatively that the intending voter is not and cannot become qualified. If there is a dispute about the facts or ground for differing inferences the court should not interfere, but leave the voter to swear in his vote at his peril, taking upon himself the risk of his persistence. (Matter of Goodman, 146 N. Y. 284; Matter of Jacobs, 45 Misc. 113.)

TITLE 7.—OFFICIAL BALLOTS

Upon affidavit, presented by any voter, that an error or omission has occurred in the publication of the names or description of the candidates nominated for office, or in the printing of sample or official ballots, the court may make an order requiring the board charged with the duty in respect to which such error or omission occurs to correct such error, or show cause why such error should not be corrected. Such board, upon its own motion, must correct, without delay, any patent error in the ballots which it may discover, or which shall be brought to its attention, and which can be corrected without interfering with the timely distribution of the ballots to the inspectors for use at such election (Sec. 344).

TITLE 8.— CORRUPT PRACTICES ACT

If any person or committee fails to file a statement or account required by the corrupt practices act or files a statement which does not conform to the requirements thereof in respect to its truth, sufficiency in detail, or otherwise, or if any person or committee has failed to comply with any other of the requirements of the act, the court by order in proceedings for contempt may compel such person or committee to file a sufficient statement or account, or otherwise comply with the provisions of the act. The applicant for such an order must present a written petition (Sec. 550; See Matter of Lance, 55 Misc. 13). The application may be made by the attorney-general, district attorney, a candidate, or by any five voters who voted at the election (Sec. 551).

ARTICLE V

MANDAMUS

TITLE 1.—ENROLLMENT

Mandamus is a proper remedy to compel a board to enroll a duly qualified voter. (Matter of Guess, 16 Misc. 306.)

TITLE 2.—ACCEPTANCE OF VOTE

Mandamus is a proper remedy to compel inspectors of election to allow a duly qualified and registered elector to vote and, in fact, is regularly issued for that purpose. (People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670.) The voter, however, must show that he is qualified (People *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y. 360.)

TITLE 3.—RECOUNT AND PRESERVATION OF BALLOTS

Disposition of Ballots: When all the ballots of any one kind have been canvassed, all of the ballots of that kind as to the counting of which any objection was taken, or which are wholly void or which are wholly blank, must be carefully and securely placed in a separate sealed package, known as "the package of protested, void and wholly blank ballots." These are the ballots on which the inspectors have ruled and recorded their rulings by appropriate written record on the ballots themselves. The other ballots must be tied together, labeled and returned to the ballot box from which they were taken (Sec. 369). After all the tally sheets and returns are completed and all the

stubs and ballots have been placed in the appropriate boxes and packages, each box must be securely locked and sealed, and deposited with the officer or board furnishing it, together with the separate sealed package of *unused* official ballots. These boxes and packages must be preserved inviolate for six months after election, except that they may be opened and their contents examined upon order of court. Unless so ordered to be preserved, they shall be opened and their contents destroyed after six months (Sec. 374). The packages of protested, void, and wholly blank ballots must also be retained inviolate in the office in which they are filed, subject to the order and examination of court, and may be destroyed at the end of six months from the canvass, unless otherwise ordered by court (Secs. 374, 437). Under an amendment to the law passed by the legislature of 1913, any candidate is entitled, *as of right*, to an *examination* in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate; but the court is to prescribe such conditions as to notice to other candidates or otherwise as it shall deem necessary and proper (Sec. 374, as amended by laws of 1913, Chap. 821). This authority is limited to an *examination* of the ballots. (People *ex rel.* Brown *v.* Freisch, Law Journal, June 28, 1915, Court of Appeals.)

Ballots in Boxes: The election law does not authorize a writ of mandamus to recanvass or recount the ballots in the boxes. (People *ex rel.* Brink *v.* Way,

179 N. Y. 174; Hearst *v.* Woelper, 183 N. Y. 274; People *ex rel.* March *v.* Beam, 188 N. Y. 266; People *ex rel.* White *v.* Supervisors, 192 N. Y. 539; People *ex rel.* Brown *v.* Freisch,*supra.*) A mandamus, however, is available to compel the inspectors to take out of the boxes protested, void and wholly blank ballots improperly placed therein and to place them in the sealed packages (People *ex rel.* March *v.* Beam, *supra;* People *ex rel.* Maxim *v.* Ward, 62 App. Div. 531); but the court will not grant this relief where the inspectors have failed to make any mark of identification on the ballots on election night and are aided only by a recollection of a situation as it existed on election night. (People *ex rel.* Brown *v.* Freisch, *supra,* reversing 153 Suppl. 277; People *ex rel.* Cantor *v.* Seid, N. Y. L. J., Feb. 13, 1915, Cohalan, J.) The better practice, in cases where the removal of ballots is authorized, is first, to grant a mandamus for an examination of the ballots in the boxes and then, if it appears by such inspection that ballots have, in fact, been locked up in the boxes which should have been placed in the sealed packages, to grant a second mandamus directing the removal thereof to the sealed packages. (People *ex rel.* Cantor *v.* Canvassers, 165 App. Div. 142.) But no alteration or erasure of any record made upon the ballots on election night is permissible. (People *ex rel.* Brown *v.* Freisch, 153 Suppl. 277.) It has also been held that if the inspectors have deliberately left the original count for an office entirely undetermined, to

be determined by the courts, and have placed the ballots in the boxes, mandamus lies to compel them to reopen the boxes and discharge the duties imposed on them by law. In such a case there is "no count, canvass or declared result." (People *ex rel.* Sturtevant *v.* Armstrong, 116 App. Div. 103; following People *ex rel.* Smith *v.* Schiellein, 95 N. Y. 124.)

Void and Protested Ballots for Candidates: As to the void and protested ballots, the law expressly authorizes a writ of mandamus upon the application of any candidate within twenty days after election to review the action of the inspectors in counting ballots which were protested and in rejecting other ballots as void. The election boards are continued in office for the purpose of such proceedings. (Sec. 381; People *ex rel.* White *v.* Aldermen, 157 N. Y. 431.)

Mandamus also lies to compel the inspectors to count protested ballots, which they omitted to count. (People *ex rel.* McLaughlin *v.* Ammenwerth, 197 N. Y. 340.)

Mandamus also lies to compel the inspectors to make a true return of the votes as actually cast and counted by them, as where they transposed figures by mistake (People *ex rel.* Henness *v.* Douglas, 142 App. Div. 224), or omitted to give a candidate the votes to which he was shown to be entitled by the unquestioned tally sheet. (Matter of Stewart, 155 N. Y. 545.)

Void and Protested Ballots for Questions Submitted: Mandamus does not lie in relation to propositions submitted. (Tamney *v.* Atkins, 209 N. Y. 202; People *ex rel.* May *v.* Strang, 137 App. Div. 848.) There is, therefore, *no remedy* for the review of void and protested ballots on questions submitted, it being within the power of the legislature to make the determina-

tion of the inspectors of election "final and conclusive" (*ante,* p. 157; People *ex rel.* May *v.* Strang, *supra*).

Procedure: In order to secure a writ of mandamus, the relator must comply with the appropriate provisions of the code of civil procedure, giving the requisite number of days' notice. He cannot base his application on a petition verified wholly on information and belief. (Matter of Brough, Seabury, J., L. J., December 2, 1910; People *ex rel.* Watkins *v.* Board of Canvassers, 25 Misc. 444; see also People *ex rel.* Perry *v.* Board of Canvassers, 88 App. Div. 185.) A petition for mandamus should refer to particular election districts and not rest on a general allegation referring to all the election districts in a city. (Matter of Ordway, 118 App. Div. 386.)

Referee: It is questionable procedure to appoint a referee to supervise the recount of void and protested ballots. (Matter of Tompkins, 23 App. Div. 224.)

TITLE 4.—CANVASS

Mandamus may issue to require a county or state board of canvassers to correct errors or to perform its duty in the manner prescribed by law (Secs. 433, 435). Where the board declines, even without any authority, to give a certificate to a candidate who is disqualified, but whose disqualification can only be determined by the legislature, the courts will not grant a mandamus to compel it to give such a certificate, because that, in effect, would be compelling it to do a wrong. (People *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y. 360.)

TITLE 5.—TITLE

Mandamus does not lie to determine title to public office (*post*, p. 185).

TITLE 6.—BY WHOM GRANTED

Unless a statute expressly so provides, a judge at chambers has no jurisdiction to issue a mandamus. (Code Civ. Pro., Secs. 2068–9; People *ex rel.* Lower *v.* Donovan, 135 N. Y. 76.)

ARTICLE VI

TAXPAYERS' ACTIONS

Neither section 1925 of the Code nor section 51 of the general municipal law authorizes a taxpayer's action against a board of elections (Matter of Reynolds, 202 N. Y. 430; County of Albany *v.* Hooker, 204 N. Y. 13; Schieffelin *v.* Komfort, 212 N. Y. 520); and the courts deny the right of a citizen and taxpayer to attempt to review an act of the legislature simply because he is one of many citizens and taxpayers. He must be affected in his private rights as distinct from those of other citizens and taxpayers. (Demarest *v.* Wickham, 63 N. Y. 320; Schieffelin *v.* Komfort, *supra.*) The leading case of Schieffelin *v.* Komfort is fully reviewed in this book at page 20.

ARTICLE VII

CERTIORARI TO REVIEW

The writ of certiorari to review the determination of a body or officer (Code Civ. Pro., Sec. 2120) cannot be invoked to review the acts and conduct of election officers. They are simply ministerial officers. (People *ex rel.* Van Sickle v. Austin, 20 App. Div. 1; People *ex rel.* Brooks *v.* Bush, 22 App. Div. 363.)

ARTICLE VIII

HABEAS CORPUS AND CERTIORARI TO INQUIRE INTO CAUSE OF DETENTION

TITLE 1.—PROCEDURE

"The writ of habeas corpus and the writ of certiorari to inquire into the cause of detention" (Code Civ. Pro., Chap. 16, Title 2, Article Third, Secs. 2015–2066) are writs to be invoked by a person imprisoned or restrained in his liberty, within the state, for any cause, or upon any pretence, for the purpose of inquiring into the cause of the imprisonment or restraint and of delivering him therefrom (Sec. 2015); except where he has been committed or is detained by virtue of a final judgment, decree or order of any competent tribunal, or by virtue of an execution or other process issued thereon (Sec. 2010; People *ex rel.* Hubert *v.* Kaiser, 206 N. Y. 46). The court, upon application, must issue a writ of habeas corpus (Sec. 2026) and, immediately after the return of the writ, must examine into the facts alleged in the return and into the

cause of the imprisonment or restraint of the prisoner, and must make its final order to discharge him therefrom, if no lawful cause for imprisonment or restraint or for the continuance thereof is shown, whether the same was upon a commitment for an actual or supposed criminal matter or for some other cause (Sec. 2031). If, however, it appear that the prisoner is properly detained, the court must make a final order to remand him (Sec. 2032). Even if a commitment is irregular, the court may remand the defendant or discharge him upon his giving bail, but the irregularity in question must be one of "those practically immaterial errors in the description or nomenclature of the crime or in the form of the warrant, which might well be overlooked when the evidence disclosed the probable commission by the accused of a crime substantially and fairly described in the warrant." (People *ex rel.* Howie *v.* Warden, 207 N. Y. 354.)

In reviewing the action of the minor courts, particularly in election cases, it has become the practice to secure, simultaneously, a writ of certiorari directed to the court to return the information or evidence, and a writ of habeas corpus requiring the production of the relator. This practice is not founded on statutory authority, but is acquiesced in on the ground of convenience. (People *ex rel.* Smith *v.* Van de Carr, 86 App. Div. 9, 12; appeal dismissed, 183 N. Y. 569; People *ex rel.* Clark *v.* Keeper, 176 N. Y. 465, 470.)

Proceedings before an inferior criminal court may be challenged, upon habeas corpus and certiorari, because of an insufficient information, or because of insufficient depositions, or because of an insufficient commitment. When a prisoner is held without authority of law, the proper tribunal will look into the

record, so far as to ascertain this fact; and if it be found to be so, will discharge the prisoner. (People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 572; People *ex rel.* Clark *v.* Keeper, *supra.*) The court hearing the application will be governed by the record, and if it is apparent upon the face of it that the court lacked jurisdiction as a matter of law, the petitioner will be discharged. (2 Spelling on Injunctions and Extraordinary Remedies, 1040, Sec. 1203.)

TITLE 2.—INFORMATION OR DEPOSITIONS

Informations: If an insufficient information is laid before a magistrate, he has no jurisdiction to issue a warrant or a subpœna. (People *ex rel.* Livingston *v.* Wyatt, 186 N. Y. 383, 392; People *ex rel.* Brown *v.* Tighe, 146 App. Div. 491.)

"There is some confusion in the authorities as to what an information really is, for the term is frequently used to designate the deposition or affidavit upon which a criminal warrant is issued. The statute itself is not free from doubt upon the subject. An affidavit taken before a magistrate may be full enough to perform the function both of an information and a deposition. This is true when it sets forth facts sufficient to authorize a warrant without further evidence, but when more proof is required and it is necessary to subpœna witnesses and take their depositions, an information is essential. Its office is that of a complaint, as the revised statutes called it. Depositions are the authority for the warrant, as the magistrate must be satisfied 'therefrom,' which refers to depositions only. Something less is required in an information than in a deposition, as otherwise there would be

no occasion for the latter. The deposition must set forth facts tending to show that a crime has been committed and that there is reasonable ground to believe that the defendant committed it. While the information need not go so far as the deposition, still it cannot rest wholly on information and belief, but facts enough must be stated to show that the complainant is acting in good faith and that he has reasonable grounds to believe that a crime has been committed by some person named or described. From all the analogies of the law, both civil and criminal, the information is intended to be made upon oath. While the statute does not expressly require it, we think it is necessarily implied, for otherwise an unfounded accusation could be set on foot and an investigation instituted upon unsupported assertion without any proof whatever." (People *ex rel.* Livingston v. Wyatt, *supra.*) An information which makes a general statement that the prisoner has been guilty of the violation of some general statute, such as the liquor tax law, is insufficient to give jurisdiction. (People *ex rel.* Sandman *v.* Tuthill, 79 App. Div. 24; People *v.* Hiley, 33 Misc. 168.) An information is also void which charges a crime against John Doe and Richard Roe in a case where the prosecutor has particular individuals in mind. (People *ex rel.* Sampson *v.* Dunning, 113 App. Div. 35.)

Depositions: The supreme court, on habeas corpus and certiorari, should discharge a prisoner, where it appears, after an arrest upon a magistrate's warrant, that the depositions upon which the magistrate issued the warrant furnished no legal evidence of the commission of a crime by the relator. (People *ex rel.* Perkins *v.* Moss, 187 N. Y. 412; People *ex rel.* McAuley

v. Wahle, 124 App. Div. 762.) "If the magistrate issued the warrant of arrest without sufficient evidence in the particular case, the process is a nullity. The question always must be whether the magistrate acquired jurisdiction to cause an arrest of the person, and the court, upon a habeas corpus proceeding, will look back of his warrant and see if the facts stated in the depositions of the prosecutor and his witnesses support his warrant. If they do not furnish reasonable and just ground for a conclusion that the crime charged had been committed and that the defendant committed it, then jurisdiction was lacking to hold the prisoner in custody for any time." (People *ex rel.* Perkins *v.* Moss, *supra;* Hewitt *v.* Newberger, 141 N. Y. 538; Swart *v.* Rickard, 74 Hun, 339; Tanzer *v.* Breen, 139 App. Div. 10.)

Where the deposition is made upon information and belief, or supposition and belief, a warrant issued thereunder is void. (Blodgett *v.* Race, 18 Hun, 132, approved Swart *v.* Rickard, 148 N. Y. at 269; People *ex rel.* Kingsley *v.* Pratt, 22 Hun, 300, 302; People *v.* Cramer, 22 App. Div. 189; McKelvey *v.* Marsh, 63 App. Div. 396; McCarg *v.* Burr, 106 App. Div. 275, 279; Tanzer *v.* Breen, *supra;* Matter of Lorman, N. Y. L. J., May 13, 1910, Whitney, J.)

An affidavit sworn to before a notary public "is entirely insufficient to authorize a warrant." (People *v.* Nowak, 5 Supp. 239.)

TITLE 3.—COMMITMENT

Upon return of a warrant, if it appear from an examination that a crime has been committed and that there is sufficient cause to believe the defendant

guilty thereof, the magistrate must make an order that the defendant be held to answer the same (Code Crim. Pro., Sec. 208). The magistrate, at the time he makes the foregoing order, must also make an order of commitment. From the earliest times, this process was required to contain a statement of the nature of the crime with which the prisoner was charged; if it does not, it is void. (People *ex rel.* Allen *v.* Hagan, 170 N. Y. 46.)

The jurisdiction of an inferior criminal court to issue a commitment may be raised upon habeas corpus and certiorari. Where the insufficiency of the process appears upon the face thereof, this may be done by demurrer thereto. Where the return sets forth a commitment showing apparent authority in the inferior criminal court, it must be done "by traversing the return and by presenting the information or evidence on which the magistrate acted." (People *ex rel.* Farley *v.* Crane, 94 App. Div. 397, 402; People *ex rel.* Willett *v.* Quinn, 150 App. Div. 813; People *ex rel.* Clark *v.* Keeper, 176 N. Y. 465.)

The question which the court determines is whether there is any evidence to justify the magistrate in making his determination. (People *ex rel.* Bungart *v.* Wells, 57 App. Div. 140, 151; Matter of Henry, 13 Misc. 734.) In People *ex rel.* Farley *v.* Crane, the court said, " The jurisdiction of a magistrate to issue a commitment is properly presented, on habeas corpus or on a writ of certiorari to inquire into the cause of detention, by traversing the return and by presenting the information or evidence upon which the magistrate acted; and if it appears thereby that there is no evidence that the crime charged has been committed by the relator, or that it has been committed, and there is no evidence of reasonable ground for believing that it

has been committed by him, he is entitled to his liberty.'' In People *ex rel.* Bungart *v.* Wells, *supra,* the magistrate made a commitment in an arson case. The relator secured writs of habeas corpus and certiorari. The sheriff returned that he had custody by virtue of the commitment; but he did not return any evidence. The relator traversed the return by denying that it appeared by the evidence that the crime of arson had been committed. The court below sustained a demurrer to this traverse. The appellate division held that this was error, reversed the order and discharged the prisoner. In that connection, the court decided that the traverse was sufficient in form and that a final commitment may be reviewed on habeas corpus in order to determine whether there was any evidence to sustain it. On the latter point, it said, " If the mere commitment were conclusive, then the writ would be largely shorn of its strength. The mere return of the magistrate would make his *ipse dixit* final, no matter how absurd or wicked or wanton his determination, when tested by the facts before him, might be. To hold this, would be to travel backward into another century and to undo the principles of the law and the statutes.'' It, therefore, follows that, even if the prisoner secures the writ after commitment, the supreme court should discharge him if the record shows that the information or depositions were insufficient. This must be so, because " the question always must be whether the magistrate acquired jurisdiction to cause an arrest of the person.'' If he did not, " the warrant and all proceedings under it are absolutely void.'' (People *ex rel.* Perkins *v.* Moss, *supra.*)

Waiver of Irregularities: A defendant does not waive the right to sue out habeas corpus by appearing, under arrest (Warner *v.* Perry, 14 Hun, 337); nor by

waiving examination (People *ex rel.* Perkins *v.* Moss, 187 N. Y. 410, 418).

Improper Commitment Where Magistrate Has Authority to Convict: In certain special cases in which the powers of the magistrate assimilate with those of a court of record, in that they may not only commit for trial elsewhere, but may actually convict, "it may be that after conviction the evidence may not be examined for the purpose of seeing whether there is any evidence to authorize the conviction" (People *ex rel.* Farley *v.* Crane, 94 App. Div. 397, 402) although, in that case, the court added, "but the question is not presented for decision now." The weight of authority, however, supports the proposition that "upon a commitment in the nature of a final judgment" neither writ acts as a writ of review which will permit the examination of the evidence to any extent whatsoever. (People *ex rel.* Reynolds *v.* Warden, 44 Misc. 149, 151; People *ex rel.* Kuhn *v.* House of Mercy, 133 N. Y. 207; People *ex rel.* St. Clair *v.* Davis, 143 App. Div. 579. See, however, People *ex rel.* Van Riper *v.* Catholic Protectory, 106 N. Y. 604; People *ex rel.* Danziger *v.* House of Mercy, 128 N. Y. 180, where the court went fully into the question as to whether there was any evidence before the magistrate.)

ARTICLE IX

ACTIONS TO TRY TITLE TO OFFICE

TITLE 1.— EQUITY

A court of equity has no jurisdiction to try the question of title to a public office. (Tappen *v.* Gray, 9 Paige, 507, affirmed 7 Hill, 259; People *ex rel.* Wood *v.*

Draper, 24 Barbour, 265; Mott *v.* Connolly, 50 Barbour, 516; People *v.* Albany Railroad, 57 N. Y. 161, 171–2; People *ex rel.* Corscadden v. Howe, 177 N. Y. 499; Welker *v.* Lathrop, 210 N. Y. 434; Moir *v.* Provident Savings Society, 127 App. Div. 591, 601–604; Matter of Hines, 141 App. Div. 569, 574–5; Matter of Sawyer, 124 U. S. 200.) Equity will not assume jurisdiction to grant an injunction to protect an incumbent against a contestant pending a proper action. (Welker *v.* Lathrop, *supra,* overruling Seneca Nation *v.* Jimeson, 62 Misc. 91.)

A court will not entertain a taxpayer's suit for an injunction (*ante,* p. 176).

TITLE 2.— MANDAMUS

Mandamus does not lie to try the question of title to a public office. (People *ex rel.* Arculariuk *v.* Mayor, 3 Johns. Cases, 79; People *ex rel.* Dolan *v.* Lane, 55 N. Y. 217; Matter of Gardner, 68 N. Y. 467; People *ex rel.* Faile *v.* Ferris, 76 N. Y. 326; Nichols *v.* MacLean, 101 N. Y. 526, 536; People *ex rel.* Nichols *v.* Asylum, 122 N. Y. 190; People *ex rel.* Wren *v.* Goetting, 133 N. Y. 569; People *ex rel.* Lewis *v.* Brush, 146 N. Y. 60; Matter of Hart, 159 N. Y. 278, 161 N. Y. 507; People *ex rel.* McLaughlin *v.* Police Commissioners, 174 N. Y. 450; People *ex rel.* Requa *v.* Neubrand, 32 App. Div. 49; People *ex rel.* Beverforden *v.* Bauer, 137 App. Div. 67.)

TITLE 3.— CODE ACTION IN NATURE OF QUO WARRANTO

Form of Remedy: The question of title to a public office can only be tried in a code action in the nature of quo warranto. (Johnston *v.* Garside, *supra;* People *ex rel.* Wren *v.* Goetting, *supra;* Matter of Hart, *supra;* People *ex rel.* Lazarus *v.* Sheehan, 128 App. Div. 743.)

The writ of quo warranto and proceedings by information in the nature of quo warranto have been abolished, but the relief formerly obtained by means thereof may be obtained by action (Code Civ. Pro., Sec. 1983). It is only the form of the proceeding that is done away with. The jurisdiction and power of the courts are not affected, nor the right to seek and reach, through them, all the remedy which that writ or information once afforded. (People *ex rel.* Hatzel *v.* Hall, 80 N. Y. 117.) The forms of procedure have been changed, but the position of the defendant, and the rules of evidence and the presumptions of law and fact are the same as they were. (People *ex rel.* Judson *v.* Thacher, 55 N. Y. 525.)

Party Plaintiff: The code authorizes the attorney-general to maintain an action, upon his own information or upon the complaint of a private person, against a person who usurps, intrudes into or unlawfully holds or exercises, within the state, a franchise or a public office (Sec. 1948). The attorney-general has discretion to decide whether to bring the action or not (People *ex rel.* Demarest *v.* Fairchild, 67 N. Y. 334), but his decision that an action should not be brought is not binding upon his successor in office. (People *v.* McClellan, 118 App. Div. 177, affirmed 188 N. Y. 618, on opinion of Ingraham, J., below). The action must be brought in the name of the people of the state, and the proceedings therein are virtually the same as in civil suits (Sec. 1984; People *v.* Cook, 8 N. Y. 67). In case the attorney-general brings the action upon his own information, but alleges that the title to the office belongs to some one other than the defendant, such other individual is a necessary party to the action. (People *v.* Mc-

Clellan, 119 App. Div. 416.) Where the action is brought on the relation or information of a person having interest in the question, the complaint must allege and the title of the action must show that the action is brought upon the relation of that person. In such a case, the attorney-general, as a condition to bringing the action, must require the relator to give satisfactory security to indemnify the people against the costs and expenses thereof. Where security is so given, the attorney-general is entitled to compensation for his services, to be paid by the relator, in like manner as the attorney and counsel for a private person (Sec. 1986).

Trial: The action must be tried by jury (Sec. 1950; Metz *v.* Maddox, 189 N. Y. 460). The court on motion may direct a special jury, if not a struck jury. (People *v.* McClellan, 124 App. Div. 664.)

Burden of Proof; Certificate of Election: In determining the question of burden of proof, it must be borne in mind that the writ of quo warranto was a writ of right for the king, against one who usurps any office or franchise, to inquire by what authority he supports his claim. The king was the fountain of honor, of office and of privilege and, whenever a subject undertook to exercise a public office or franchise he was, when called upon by the crown, through the writ of quo warranto, compelled to show his title, and, if he failed to do so, judgment passed against him. Thus, in proceedings by information to try title to office, the courts invariably recognized the rule that the burden was upon the defendant to show his right and that, failing to do it, judgment must go against him; and in actions under the code the same rule is enforced. The possession of the office is no evidence of right, but the burden is upon the defendant to show, by affirmative

evidence, that his possession is a legal and rightful one. (People *ex rel.* Judson *v.* Thacher, 55 N. Y. 525.) A certificate of the proper authorities certifying to his election is *prima facie* evidence (People *ex rel.* Watkins *v.* Perley, 80 N. Y. 624), but *prima facie* evidence only. (People *ex rel.* Benton *v.* Vail, 20 Wendell, 12; People *ex rel.* Smith *v.* Pease, 27 N. Y. 45; People *ex rel.* Judson *v.* Thacher, *supra.*) Judgment in an action by the people may be rendered against the defendant without adjudging that the title to the office is in the relator (People *ex rel.* Judson *v.* Thacher, *supra*); but between the relator and the defendant, the burden is upon the relator to make out a better title. (People *ex rel.* Watkins *v.* Perley, *supra.*)

Ballots as Evidence: The ballots cast become lawful and proper evidence and neither party can properly be excluded, as for failure to serve a bill of particulars, from the right of availing himself of this evidence upon the trial. Either party may open the boxes without preliminary evidence tending to show misconduct, error, omission or fraud (People *v.* McClellan, 191 N. Y. 341), but preliminary evidence must be given to show that the ballots have been preserved in the boxes inviolate. (People *ex rel.* Dailey *v.* Livingston, 79 N. Y. 279; People *v.* McClellan, *supra.*)

Scope of Enquiry: Starting with the principle that the election and not the return is the foundation of the right to an elective office, it is competent, in an action to try title, not only to recanvass the ballots in the ballot boxes, but to go behind the ballots and purge the return by introducing oral testimony (People *ex rel.* Stemmler *v.* McGuire, 2 Hun, 269, 274, affirmed 60 N. Y. 640), as, for instance, to prove that votes cast for a candidate of a certain name were cast for a candidate

of a not inconsistent name (People *v.* Ferguson, 8 Cowen, 102; People *v.* Seaman, 5 Denio, 409; People *v.* Cook, 8 N. Y. 67); or that improper votes were received and counted which were cast by persons not qualified to vote (People *ex rel.* Smith *v.* Pease, 27 N. Y. 45; People *ex rel.* Judson *v.* Thacher, *supra*); or that proper votes were not recorded on a voting machine. (People *ex rel.* Deister *v.* Wintermute, 194 N. Y. 99. Compare, however, 15 Cyc. 423; N. Y. Cement Co. *v.* Keator, 62 App. Div. 577, affirmed 173 N. Y. 235.)

Direction of Verdict: In an action to try title, the court may direct a verdict for the plaintiff, even though the defendant has a certificate of election, if the plaintiff makes out a *prima facie* case by oral testimony and there is no direct proof to meet it. (People *v.* Cook, 8 N. Y. 67.)

Judgment: Where a defendant is adjudged to be guilty of usurping or intruding into or unlawfully holding or exercising an office, franchise or privilege, final judgment must be rendered, ousting and excluding him therefrom and in favor of the people or the relator, as the case requires, and for the costs of the action. The court, in its discretion, may also award that the defendant pay to the people a fine not exceeding $2,000 (Code Civ. Pro., Sec. 1956).

Subsequent Proceedings: When final judgment has been rendered in favor of the person alleged to be entitled, he may recover, by action, the damages which he has suffered in consequence of the defendant's usurpation. (Code Civ. Pro., Sec. 1953; Kessel *v.* Zeiser, 102 N. Y. 114; Stemmler *v.* Mayor, 179 N. Y. 473.)

ARTICLE X

EQUITY

Equity has no jurisdiction over the appointment and removal of public officers, even at the instance of a taxpayer (*ante,* p. 176), or to maintain the *status quo ante,* p. 184).

A court of equity, obviously, cannot entertain a taxpayer's suit to enjoin a public officer from an alleged violation of his campaign pledges. (O'Reilly *v.* John Purroy Mitchel, 85 Misc. 176.)

The election law must be strictly construed in determining the subject of summary judicial review thereunder. It does not authorize a temporary injunction against *threatened* acts of election officers (Matter of Zimmer, 76 Misc. 320; Matter of Woods, 151 Supp. 856); and, generally, an injunction order in an election case is a nullity and cannot be enforced by contempt proceedings (Matter of Holle, 160 App. Div. 369).

ARTICLE XI

ACTION FOR DAMAGES AGAINST ELECTION OFFICERS

At common law, if election officers wilfully and maliciously refused to receive the vote of a qualified voter, he could maintain an action to assert his right and recover damages against them. (Ashby *v.* White, 2 Lord Raymond, 938; Jenkins *v.* Waldron, 11 Johnson, 114.) If any such right still exists under the present statute, where a qualified voter may always compel the receipt of his vote by mandamus (*ante,* p. 171), malice is undoubtedly a necessary element to the action. (Lurman *v.* Jarvie, 82 App. Div. 37, 45.)

Part Fifth

CRIMES RESPECTING THE ELECTIVE FRANCHISE

ARTICLE I

IN GENERAL

The statute law of the state makes a crime of virtually every act or omission, whether of voter or election officer, which is not in substantial accordance with the provisions of the election law. Many of these statutory provisions are contained in the penal law, but many of them are also scattered through the election law, without any attempt at systematic arrangement. Indeed, many of them overlap one another, and there is urgent need for systematic codification by the legislature. These various provisions will be briefly considered, although it will be impossible, for the purposes of this book, to attempt anything approaching a complete codification.

ARTICLE II

ENROLLMENT

The election law, by an amendment passed in 1913 (Laws of 1913, Chap. 587), makes the signing and mailing or delivery of an enrollment blank, false in any respect, a misdemeanor (Sec. 184).

ARTICLE III

PRIMARY ELECTIONS

The penal law sets forth thirteen different sets of acts constituting "misdemeanors at or in connection with political caucuses, primary elections, enrollment in political parties, committees and conventions" (Sec. 751). These include acts by voters, such as illegal voting, illegal enrollment, interference with voting or canvass of votes, bribery and taking a bribe, and generally any act tending to affect the result of a primary election or convention. They also include acts by officers, tellers, canvassers, election inspectors, primary inspectors, custodians of primary records, clerks, employees and any officer of a political committee or a convention. These acts consist in violating the election law, permitting anyone else to do so or refusing to do any act required by the election law, particularly in relation to primaries, enrollment and conventions.

The penal law also sets forth five sets of acts constituting a misdemeanor in relation to designating petitions, such as paying voters to sign the same or promising employment for that purpose and paying any person for services in procuring signatures upon the basis of the number of names procured by such person, or at a fixed amount per name (Sec. 760a).

The election law, in an abundance of precaution, also makes any violation of the articles of the election law relating to enrollment, party organization, party nominations and designations, conduct of primary elections and conventions a misdemeanor (Sec. 93).

Perjury: It also declares all oaths administered under the provisions of the election law to be oaths required by law and necessary for the ends of public justice (Sec. 94).

ARTICLE IV

REGISTRATION

TITLE 1.— FALSE REGISTRATION

The penal law sets forth five sets of acts constituting false registration, which is made a felony punishable by imprisonment for not more than five years (Sec. 752). These include illegal registration, attempts thereat, and unlawfully permitting or advising another to commit any such act.

TITLE 2.— MISCONDUCT OF REGISTRY OFFICERS

The penal law makes the wilful violation by any member or clerk of a registry board of any provision of the election law relative to registration, or the wilful neglect or refusal to perform any duty imposed by law, or fraud in the execution of such duties, a felony punishable by imprisonment for not more than ten years (Sec. 753).

TITLE 3.— REGISTRY LIST

The penal law makes the destruction, removal or mutilation of any list or register of voters a misdemeanor (Sec. 754). The election law makes the same act in relation to the public copy of registration a felony (Sec. 184).

TITLE 4.— FALSE APPLICATION

The election law makes any act in connection with a false application for registration a felony (Sec. 184).

TITLE 5.— PERJURY — CHALLENGE AFFIDAVIT

The election law makes it perjury to incorporate any false statement in any challenge affidavit or to take a false oath before a board of inspectors. Suppressing, altering or mutilating a signed challenge affidavit is also a felony (Sec. 184).

TITLE 6.— ASSISTING FALSE REGISTRATION

The penal law makes it a misdemeanor for any person dwelling in a building in a city to wilfully refuse to truly answer any question, or to give any false answers to any question relating to the residence and qualifications as a voter of any person dwelling in such building, or of any person who appears on the register as residing thereat, or to knowingly harbor or conceal any person who has falsely registered as a voter, or to rent a room or bed to any person to be used for the purpose of unlawfully registering or voting therefrom (Sec. 757).

TITLE 7.— FALSE REGISTRATION FOR SPECIAL ELECTION

The election law prohibits an elector from registering in one election district for a special election while his name appears on the register of another district to be used at that election and makes the violation thereof a felony punishable by imprisonment for not less than two nor more than five years (Sec. 160).

ARTICLE V

IMPEDING SUPERINTENDENT OF ELECTION

The election law, in the article dealing with the superintendent of election, enacts and defines various felonies and misdemeanors.

It is a misdemeanor to neglect or refuse in a proper case to furnish information or exhibit records, papers and documents (Sec. 475).

It is a felony to fail, on demand of the superintendent or a deputy, to render the aid or assistance demanded, or to wilfully hinder or delay him. The penalty is not more than three years' imprisonment. If the offender is a public officer, which includes a police officer or deputy sheriff, he forfeits his office in addition (Sec. 476).

It is a misdemeanor to disobey a subpœna attested in the name of the superintendent or to refuse to testify under oath (Sec. 477).

It is a felony to make a false statement under oath (Sec. 478).

It is a misdemeanor for a landlord, proprietor, lessee, keeper or lodger to violate the law as to reports (Sec. 480).

It is a misdemeanor for the holder of a liquor tax certificate to violate the law as to affidavits; and, if he incorporates any false statement therein, he becomes guilty of perjury and in addition forfeits his liquor tax certificate (Sec. 481).

It is a misdemeanor for an owner or lessee to neglect to furnish a list of male residents when demanded by a superintendent. If the owner furnishes a list containing a false name or a false period of

residence, he is guilty of a felony. If a lessee furnishes a false list, he is liable for a penalty of one thousand dollars (Sec. 484).

ARTICLE VI

CERTIFICATES OF NOMINATION AND OFFICIAL BALLOTS

The penal law provides that a person is punishable by imprisonment for not more than five years if he falsely makes oath to or defaces or destroys a certificate of nomination, files or receives a certificate knowing any part thereof was falsely made, suppresses a certificate which has been duly filed, forges or falsely makes the official indorsement on any ballot or, having charge of ballots, suppresses them, except as provided by law (Sec. 760).

ARTICLE VII

OFFICIAL BALLOTS

Failure to Deliver: The penal law provides that any person who has undertaken to deliver official ballots and neglects or refuses to do so is guilty of a misdemeanor (Sec. 761).

Improper Use of Pasters: The election law makes the use of any paster on an official ballot otherwise than provided by law to be a felony, punishable by imprisonment for not less than one nor more than five years (Sec. 137).

ARTICLE VIII

REFUSAL TO PERMIT EMPLOYEES TO ATTEND ELECTION

The penal law makes it a misdemeanor for a person or corporation to refuse to any employee entitled to vote at an election the privilege of attending thereat, or subjects such employee to a reduction of wages because of the exercise of such privilege (Sec. 759).

ARTICLE IX

ILLEGAL VOTING

The penal law sets forth five different sets of acts constituting illegal voting which relate not only to voting, offering or attempting to vote, but also to procuring, aiding, assisting, counseling or advising illegal voting. Any person who does any such act is guilty of a felony, punishable by imprisonment for not more than five years (Sec. 765).

ARTICLE X

GENERAL ELECTIONS — ELECTION OFFICERS

The penal law sets forth eighteen sets of acts constituting "misdemeanors in relation to elections." These include acting as an election officer without being able to read and write the English language, or without being otherwise qualified to hold such office; knowingly permitting any person to vote who is not entitled to vote; removing any official ballot from a

polling place before the closing of the polls; unlawfully going or remaining within the guardrails; placing any mark upon a ballot with the intent that it may thereafter be identified, wilfully disobeying any lawful command of an inspector, and many others (Sec. 764).

The penal law also provides that a public officer who omits, refuses or neglects to perform any act required of him by the election law, or refuses to permit the doing of any act authorized thereby is punishable by imprisonment for not more than three years or by a fine of not more than three thousand dollars or both (Sec. 763).

The election law provides a penalty of one hundred dollars for an election officer who fails to take the oath of office or wilfully neglects or refuses to discharge his duties or, if removed, to turn over the register and other papers to his successor (Sec. 310).

The election law makes the violation of the oath taken by election officers and other persons assisting disabled and illiterate voters a felony, punishable by imprisonment for not less than two nor more than ten years (Sec. 357).

The penal law makes it a misdemeanor for any election officer or watcher to reveal how a voter has voted, or to communicate his impression on that point; also to unfold, before the closing of the polls, a ballot which a voter has prepared for voting (Sec. 762).

The election law makes it a felony for any person to prompt a voter, previously challenged at registration, in answering any questions put to him on election day (Sec. 355).

The penal law provides that an inspector or poll clerk who intentionally makes a false canvass or a

false statement of the result or any person who induces or attempts to induce any inspector or clerk so to do is guilty of a felony (Sec. 766).

The election law makes it a felony for an inspector to refuse to write in ink on the back of any ballot a memorandum of a ruling on or objection to the counting thereof or to refuse to place a ballot to the counting of which objection has been made in the package of protested ballots (Sec. 369).

The election law imposes on the chairman of the board the duty of certifying to the facts necessary to make up the pay-roll and makes it a misdemeanor to wilfully make a false certificate (Sec. 309).

The election law prohibits the sale of intoxicating liquors, ale or beer in the polling place and provides that any person so doing is guilty of a misdemeanor (Sec. 299).

The election law provides that the provisions of the penal law and its provisions relating to misconduct at elections shall apply to elections with voting machines. It also makes it a felony, punishable by imprisonment for not less than one year nor more than five years to tamper with any voting machine or for any election or police officer or assistant to permit any such interference (Sec. 417).

ARTICLE XI

NATURALIZATION CERTIFICATES

The penal law provides that any person who knowingly or wilfully procures a certificate of naturalization to enable himself or any other person to vote when he or such person is not entitled to become a

citizen or to exercise the elective franchise is guilty of a felony (Sec. 777).

The penal law also makes it a felony for any person to knowingly and wilfully present a certificate of naturalization, fraudulently secured, with intent to enable any person to vote at any election when such person is not entitled to become a citizen or to exercise the elective franchise (Sec. 778).

ARTICLE XII

CORRUPT PRACTICES

As a matter of convenience this subject has been fully considered elsewhere (*ante*, p. 151).

ARTICLE XIII

POLICE IN POLITICS

The penal law sets forth three sets of acts constituting "misconduct concerning police commissioners or officers or members of any police force" (Sec. 756). These are designed to keep the police out of politics and eliminate any use of official power in aid of or against any party or organization, such, for instance, as transferring an officer because of party adherence, contributing or receiving any moneys for any political fund or becoming a member of any political club.

ARTICLE XIV

CONSPIRACY

The penal law provides that conspiring by two or more persons to promote or prevent the election of any person to a public office by the use of any means which are prohibited by law is punishable by imprisonment for not more than one year (Sec. 773).

ARTICLE XV

GIVING AND RECEIVING CONSIDERATION FOR FRANCHISE

The penal law defines at considerable length and in great detail both the giving consideration for franchise (Sec. 768) and the receiving consideration for franchise (Sec. 769). Both are made felonies. The punishment for giving also includes forfeiture of office and incapacity to hold any office for five years after conviction and the punishment for receiving also includes the exclusion from the right of suffrage for five years after conviction.

ARTICLE XVI

DURESS OR INTIMIDATION OF VOTERS

The penal law makes it a misdemeanor for any person or corporation to be guilty of duress or intimidation of voters, and provides that, if a corporation, it shall, in addition, forfeit its charter. This provision incidentally makes special reference to the use

of "pay envelopes" upon which there is written or printed any political motto or device, containing threats, calculated to influence the political opinions or actions of employees (Sec. 772).

ARTICLE XVII

USE OF POSITION OR AUTHORITY — POLITICAL ASSESSMENTS

The penal law sets forth four sets of acts which it defines as "corrupt use of position or authority" and punishes by imprisonment for not more than two years or by a fine of not more than three thousand dollars or both (Sec. 775), and six sets of acts consisting of use of position or authority to compel or induce "political assessments" and punishable as a misdemeanor (Sec. 774). Section 775 includes and seeks to prevent corrupt bargaining by or with a boss, exercising authority which can be used to influence a nominating body. (People *v.* Willett, 213 N. Y. 368.)

There are also provisions in the civil service law relating to the same subject in respect to both officers and employees (*ante,* p. 153).

ARTICLE XVIII

IMMUNITY

The penal law provides that any person offending against any section of the article dealing with the elective franchise is a competent witness against any other person so offending, but the testimony so given shall not be used against the person testifying (Sec. 770).

ARTICLE XIX

PENALTIES

TITLE 1.— MISDEMEANORS

Any person convicted of a misdemeanor under the article of the penal law relating to the elective franchise shall be punished, for a first offense, by imprisonment for not more than one year or by a fine of not less than one hundred dollars nor more than five hundred dollars or both such fine and imprisonment. Any person convicted of a misdemeanor for a second or subsequent offense shall be guilty of a felony (Sec. 782).

TITLE 2.— FELONIES

Punishment for a felony for which no other punishment is specially prescribed is punishable by imprisonment for not more than seven years or by a fine of not more than one thousand dollars or both (Sec. 1935).

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